

System Breakdown: The Dispute Elections of 1876 and 2000

Author: Kristina Pflanz

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Author's Preface

That “crazy election” was the event that stood out the most during my senior year of high school in 2000-2001. I was only seventeen years old at the time of the election, and therefore could not vote in it. But even though I was not eligible to participate in the election, I – along with the rest of the country – was completely mesmerized as the post-election events unfolded. Although I tried to keep up with everything, I soon became confused by all the different lawsuits and what their results meant. After *Bush v. Gore* was revealed on December 12, I was disappointed by the result but not surprised – George W. Bush had been the presumptive winner, and that had not changed since the day after Election Day.

The finality that December 12 brought, however, did not change my sentiments: why didn't my guy win? I had read many newspaper articles that told of voter disenfranchisement in Palm Beach County and questionable legality of Bush votes. Moreover, the fact that George W. Bush's own brother was the governor of the contested state never ceased to bother me.¹ The 2000 election – in my view at the time – was illegitimate.

Four years later, the reelection of the illegitimate president was imminent and it was time for me to choose a topic for my thesis. As a student of American politics, I was particularly interested in the role of presidents in American government. I thought it would be an appropriate topic for my thesis to study the events of the 2000 election in depth and see if I still believed that my guy had been shafted, and also to examine how the 2000 election had affected Bush's presidency, for it had seemed as if people had forgotten the election for most of Bush's term. Then I came across another election, the election of 1876, with remarkably similar circumstances – a president who had lost the popular vote, disputed states, apparent voter disenfranchisement, and resolution via the Supreme Court. By studying the two elections simultaneously, I hoped to grasp the consequences of the infrequent but probable failure of the American electoral system

¹ Many European scholars too questioned whether a country's democratic process deserved to be taken seriously when the state officials ultimately making the decisions in a close election are the co-chair of one candidate's state campaign (Katherine Harris) and the same candidate's brother (Jeb Bush).

and the legitimacy of the men who were eventually awarded the presidencies, Presidents Rutherford B. Hayes and George W. Bush.

Now I need to explain something about the sources I used. Regarding the sources of the 1876 election (which was clearly less documented than the 2000 election), I can assert that my sources were more or less objective, for all of them were either scholarly works or articles from reputable journals. On the other hand, my sources of the election of 2000 do tend to have a liberal bias. I did vigilantly try to choose objective sources, but even the most objective sources I could find were largely unable to shield the author's view of the election, whether by which events he/she chose to include or not include, or how certain events were described. I did, however, try to choose sources from both sides – some that were slightly biased for George W. Bush and others that were slightly biased for Al Gore. On the whole though, my sources have a liberal slant for three reasons: first, the Gore side lost, and the losers are more likely to write books decrying their loss than the winners; second, academics and law professors (who are most likely to author books or write journal articles) are more likely to be liberal; and third, I acted on my own biases as well. I also must point out that I used many articles from the *New York Times*. I chose the *New York Times* because it is probably the most widely read newspaper in the country and because it has arguably the best reputation for journalism of all the newspapers in the country. However, by my own assessment as well as by the assessment of many of the works I read, the *New York Times* did have liberal tendencies as well – meaning that although the articles were accurately written, they were noticeably on the whole pro Gore.

Finally, I want to thank my thesis advisor, Professor Marc Landy, for his guidance in this year-long endeavor of mine.

Sincerely,

Kristina Pflanz

April 15, 2005

Chapter 1: Introduction

Americans largely regard the United States' republican system as the best in the world. Although this sentiment may be the result of sheer ignorance of other political systems combined with the U.S.'s current status as the sole global power, one cannot deny that the U.S. system surpasses all other systems on account of its durability. The United States established its democratic system in 1776 and only once in 1787 did it revise this system, and this revision was not on account of a government collapse. The United States Constitution has ruled since the passage of the Constitution in 1789. This makes the U.S. government the oldest in the world, with only Norway (1814) and Belgium (1831) as the nearest comparisons. Furthermore, the U.S. republican government never collapsed in times of extreme national strife – such as the Civil War – unlike other former world powers like France, which is currently ruled by its fifth republic.

The remarkable durability of the U.S. Constitution, however, does not mean that it always functions perfectly. The Founding Fathers knew that a perfect system was impossible, which is why they used somewhat ambiguous phrasing in order to leave the possibility for interpretation and even change open. The system of checks and balances as well as the judicial branch in general are both institutions created to mitigate the issues that the Constitution may not cover or whose coverage is vague. Unfortunately, there were still some issues in which the Constitution remained silent or did not point out which branch was the designated authority in case of a problem.

One of the first constitutional features to come under scrutiny was the method of electing the president. In Article II, Section 1, clauses 2-4, the Constitution covers the election of the president:

Clause 2: Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

Clause 3: The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves.

And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately choose by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner choose the President. But in choosing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall choose from them by Ballot the Vice President.

Clause 4: The Congress may determine the Time of choosing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.²

The constitutional problem became evident in the election of 1800, when both Thomas Jefferson and Aaron Burr received equal amounts of electoral votes. It was common knowledge that Thomas Jefferson was supposed to be president and Aaron Burr vice president, but that would not solve the problem at hand since the Constitution specified that the one with the most electoral votes would be president, and the runner-up would be vice president. As specified by the Constitution, the election was transferred to the House of Representatives – and this is where the constitutional crisis arose. Since Burr and Jefferson were each a candidate for president in his own right, this created a loophole that allowed devious Federalist representatives (whose candidate John Adams

² *United States Constitution*, <http://www.house.gov/Constitution/Constitution.html> (accessed 16 April 2005).

had lost) to create havoc in the election by voting for Burr as president instead of Jefferson. Thirty-five ballots were cast by the House, each resulting in deadlock. Finally, Jefferson was elected on the thirty-sixth ballot. The result of the election of 1800 was the Twelfth Amendment, which required distinct votes for president and vice president respectively.

A second presidential election glitch came in 1824, when four candidates – Secretary of State John Quincy Adams, General Andrew Jackson, Secretary of Treasury William Crawford, and Speaker of the House Henry Clay – ran for president, which resulted in an inability by all four candidates to acquire the 131 electoral votes needed to win the election. General Jackson came closest with 99 electoral votes. Again, the election was handed to the House, which produced John Quincy Adams as the winner. Although Adams was the legal winner, the result aroused animosity by Jackson and his supporters, since Jackson had won the plurality of both the electoral and popular votes and thereby felt he had a legitimate claim to the presidency. Jackson charged that Adams and Henry Clay, who had placed fourth in the election and therefore was left out of the runoff in the House, had constructed a “corrupt bargain” by utilizing Clay’s influence as Speaker of the House. Nevertheless, Adams became the new president.

The elections of 1800 and 1824, however, were merely constitutional glitches that did not produce serious crises. Had Aaron Burr been elected in 1800 instead of Thomas Jefferson though, a serious crisis could have arisen. Fortunately that did not happen. The election of 1824, on the other hand, was a legally legitimate result – it is remembered as a constitutional glitch only because its result did not seem warranted at the time. Despite the intricate issues of the two elections, both ultimately had built-in solutions provided by the Constitution.

Unfortunately, there have been two presidential elections in the United States’ 225+ year history that truly yielded serious constitutional crises: the elections of 1876 and 2000. Both elections had the same problem to which the Constitution was silent – a state or states whose electoral votes were disputed, and an election outcome that would remain unresolved until the disputed states’ electoral votes were awarded. There were other similarities as well, namely: both elections were a contest between two

entirely new presidential candidates following a two-term incumbent; an incredibly close popular vote divide between the two parties, with the election's loser as the winner of the popular vote; a prolonged post-election period in order to resolve the election; and a populace sharply divided as a result of the elections' resolutions. However, the differences in the elections were also evident: the obvious technological disparity between 1876 and 2000; the circumstances in which the elections were conducted – a mere eleven years following the Civil War versus a time of relative peace and prosperity; the respective roles of the media in each election; and the difference in perception as to which branch of government had the proper authority to settle the dispute – Congress or the courts.

It is these differences between the two elections that ultimately point out that while the elections of 1876 and 2000 were similarly controversial because of disputed electoral votes, the significance of the two conflicts in history is actually divergent. The election of 1876, between Republican Rutherford B. Hayes and Democrat Samuel Tilden, was actually over the fate of Reconstruction. The dispute in the election lay in the alleged morality of the Republicans, the victors of the Civil War and champions of civil rights for former slaves, versus the Democrats, who wanted to thwart this progress. Thus, the ballot-counting essentially focused on what the outcome would have been had the election been free and fair. The election of 2000, between Republican George W. Bush and Democrat Al Gore, focused more on the inherent flaws in the U.S. electoral system and state law; partisan election officials and courts, and the discrepancy between voter intent and legality. In the ballot-counting of this election, the forces of partisanship constantly clashed with legal procedures.

The purpose of this essay then, is to examine these two elections in detail, with particular emphases on the paths pursued by each candidate in the post-election period and the ultimate remedies to the crises. Also crucial to each election was what was at stake between the two parties as well as the legitimacy issues that followed the victor in his presidency. This is especially important and hence worth restating – is the victor of a disputed election perpetually haunted throughout his term by a veil of illegitimacy caused by the resolution of the election? I aim to determine the extent to which seemingly illegitimate presidents are actually hindered by this apparent illegitimacy. In

order to complete these objectives, I begin by outlining background data – the circumstances of the United States at the time, the history of each candidate, and the campaign period. I follow this by presenting the details of Election Night, the initial results, and the components that contributed to these results. Then, I outline the history of the post-election phase, paying particular attention to the contention between the two parties in each election between what is legally authorized versus what is reasonable under the circumstances, given that the conduction of each election was not exactly “free and fair.” Next, I demonstrate the resolutions of both elections and the public perception of these resolutions. Finally, I examine the respective presidencies of the victors, focusing on the events and policies crucial to their legacies in order to determine whether the success or failure of their presidencies was caused by their apparent illegitimacy.

This essay is mainly a historical survey with some analysis. I do not come to a formal conclusion about the results of both elections (e.g., Tilden should have won, etc). Although that had been my original intent, I later decided that the impacts of the two elections on both the citizens of the United States as well as President Hayes and President Bush were far more intriguing. Moreover, as the analysis will demonstrate, both sides present strong cases as to who ultimately won these elections. It is far more important to understand that history itself cannot change, but its impact can determine the future – and the 1876 and 2000 elections certainly impacted U.S. citizens at the time, but the long-term consequences are debatable.

Chapter 2: The Election of 1876

The year 1876 was a special year, because it marked the one hundredth birthday of the United States of America. “Centennial mania” absorbed all regions of the nation, due to the great Centennial Exhibition held west of Philadelphia that served as a “physical embodiment of American virtue and American progress”³. Indeed, the uncertain experiment with a republican system as a reaction to tyrannical English monarchy had proven to be an enduring form of government.

Yet, even as the Centennial Exhibition attracted over eight million visitors, an ominous sense of threat and instability pervaded the nation. The most devastating war in the history of the world had concluded on American soil scarcely only a decade before. The nation still remained bitterly divided along north/south lines, and discernable differences of culture reinforced mutual suspicion. The two successive executives after Lincoln could at best be described as failures, the first resulting in impeachment and the second in the exposure of corruption in national politics. The economy was in the midst of the severest depression it had ever experienced due to the Panic of 1873, and this was largely blamed on President Grant and Republicans in Congress. The extreme partisanship of the Reconstruction era threatened to damage the democratic political system that for a hundred years now had been the foundation of Americans’ sense of their country’s historic purpose in the world.⁴ The two-party system designed inadvertently by Jefferson was also in trouble as a means for choosing the next executive, because neither party was seen as credible and acceptable – the Democrats were seen as the party of the South, desperate to undo the achievements of the Civil War and Reconstruction, while the Republicans were seen as a party full of corrupt politicians starving to impose northern industrialization at any cost. Indeed, it appeared to be a difficult decision for any citizen of the United States to choose a candidate for the 1876 presidency.

The election of 1876 for president was important because the Democratic challenge to Republican hegemony of the presidency since 1860 was stronger than ever. Whoever became the next president could potentially alter the course of

³ Morris 2003, 19.

⁴ Polakoff 1973, 3.

Reconstruction, and the old tensions of the Civil War that had been suppressed for so long were feared to be in revival. Yet, the two candidates who eventually emerged as contenders for the presidency in 1876 were not themselves totally shrouded by the mishaps of their respective parties. Both were perceived as somewhat separated from their parties due to the comparably clean records of both candidates. Tilden, the Democratic candidate and the governor of New York, was perceived as a reformist within the Democratic Party due to his challenge to William Marcy “Boss” Tweed, head of the Democrats’ notorious patronage machine, Tammany Hall.⁵ Rutherford B. Hayes, the Republican candidate and governor of Ohio, was seen as an acceptable compromise in an internally divided party because both his public and private lives were impeccably clean, which was an important trait after Grant’s scandal-weary administration. Nevertheless, it was the two candidates’ similarities, rather than their differences, that most contributed to making the election of 1876 the longest and most disputed in American history.

Democratic Candidate Governor Samuel J. Tilden

The Democratic nominating convention for its presidential candidate in 1876 was largely a forgone conclusion, for the Democrats were almost solidly united behind their candidate that had the best chance of winning the election since before the Civil War: Samuel J. Tilden. Tilden was the optimal candidate for the Democrats because he was a reformist candidate from New York, thereby eliminating several Democratic prejudices and instead presenting a strong candidate especially to those disgusted with the Grant Administration and the general laxity of the Republicans. He was also independently wealthy, which was integral to both political parties in 1876 because the nation was still in depression, though it is notable that he never actually spent his own money on the campaign. Furthermore, it was essential that Tilden was a popular figure in New York, the most populous state in the Union and carrying 35 electoral votes. If the “solid South” were to join even just two northern states – New York and Indiana – in voting Democratic, then the Democrats would recapture the presidency.⁶ Even northern and

⁵ Morris 2003, 99.

⁶ Polakoff 1973, 14-15.

western states that had previously voted Republican had become swing states in the election of 1876 because of disaffection with the Republican Party. In short, the Democrats had better than just a solid chance of winning this election, and they intended to utilize all their forces.

Samuel Tilden was elected governor of New York in 1874 after serving as New York's Democratic Party Chairman since 1866. He was noted for his incredible organizational skills while serving as Democratic Party Chairman by conducting campaigns through finding dedicated and experienced canvassers in every election district whose job it was to educate the voters.⁷ In addition to his organizational success with previous Democratic campaigns, he also had two important aspects of his personal history that were essential for the Democratic Party: he was a Unionist during the Civil War who remained loyal to Lincoln, and he had actively challenged the corrupt Democratic machinery of Tammany Hall and its leader, Boss Tweed. Regarding the former, it is notable that Tilden was an anti-slavery Democrat who never switched his affiliation to the Republican Party in the mid-1850s when so many others were doing so.⁸ He considered slavery a "blighting presence whose spread into the new territories would be the greatest opprobrium of our age," but was more concerned with preserving the Union than abolishing slavery, so he campaigned for Douglas in 1860.⁹ When Lincoln won and the Civil War commenced, however, he pledged support to President Lincoln and even consulted with him over political and financial matters relating to the war.¹⁰ He still remained a Democrat, though, as he disagreed with many of Lincoln's decisions over how best to preserve basic American liberties; most notably, he disagreed with Lincoln's suspension of the writ of habeas corpus.¹¹ The other aspect of personal history, his overthrow of Boss Tweed, was a dramatic display of detective work and audacity that proved he was incorruptible, fearless, and intelligent. Both aspects contributed to the very important image of Tilden as a reformist and loyal both to the Democratic Party and to the outcome of the Civil War.

⁷ Polakoff 1973, 73.

⁸ Morris 2003, 94.

⁹ Morris 2003, 95.

¹⁰ Morris 2003, 96.

¹¹ Morris 2003, 97.

For millions of Democrats, the election of 1876 was crucial in determining the direction that the country would be moving in after over a decade of Reconstruction. Northern and southern Democrats alike complained that the federal government seemed less the protector of liberty than obstructor to personal freedom.¹² They denounced the sins of “Grantism” in Washington – wasteful spending, extreme taxation, economic misconduct, corruption and scandal, and abuses of Reconstruction.¹³ On several main issues, however, the Democrats agreed with the Republicans: the need for reform in government, the need for a gold-based currency, and the need to uphold the Fourteenth and Fifteenth Amendments. As was expected, on the subject of Reconstruction Tilden remained ambiguous but condemned the “systematic and insupportable misgovernment imposed on the states of the South.”¹⁴ Hayes’s position was similarly ambiguous, and this pleased no one. However, Tilden’s position may have contributed to the isolation of southern Democrats who were already suspicious of his northern roots and pro-business background.¹⁵ The northern Republicans were equally suspicious of Tilden, but mostly because of the threat he posed to Republican domination of the presidency. A typical Republican assessment of Tilden at this time was:

“Sammy is worth \$3,000,000. Everybody belonging to him is well off, so that he has no claims upon his fortune. He is a bachelor, you know. He will not hesitate to spend \$500,000 or if need be \$1,000,000 to promote his election; and I need not tell you what money can effect in the eastern cities...Besides, it is a mistake to underrate Sammy’s own talents. He is one of the most expert organizers and adroit schemers I ever came into contact with.”¹⁶

Republican images of corrupt tactics attributed to Tilden such as this certainly did not help his cause during the election dispute, however untrue.

¹² Morris 2003, 118.

¹³ Morris 2003, 119.

¹⁴ Morris 2003, 135.

¹⁵ Morris 2003, 135.

¹⁶ Polakoff 1973 (Comly Papers), 112-113.

Republican Candidate Governor Rutherford B. Hayes

While the Democrats had little trouble uniting behind their candidate Samuel J. Tilden, the party of Abraham Lincoln was more divided than ever. The division of the Republicans at their nominating convention was largely indicative of the troubles they were to experience later in confirming their candidate as a winner. Coming into the convention held in Cincinnati in June of 1876, the frontrunner was clearly James G. Blaine of Maine, a powerful force as Speaker of the House of Representatives. Yet Blaine's nomination was certainly not assured, as a solid group known as the Liberal Republicans opposed his nomination almost immediately, as he like so many others at this time was shrouded with a scandal. Three other strong candidates were Roscoe Conkling, senator from New York; Oliver Morton, governor of Indiana; and Benjamin Bristow, Secretary of the Treasury under Grant. Each, however, was hindered as a candidate for president for various reasons: Conkling could challenge Tilden in the state of New York, but was associated with corrupt machine politics; Morton was perceived as too radical and in ill health; and Bristow had alienated party regulators by prosecuting the Whiskey Ring too strongly.¹⁷

Hayes was not initially a frontrunner; in fact, he was everyone's second choice – he even wrote in his diary on June 16, “If [Blaine] fails my chance as a compromise candidate seems to be better than that of any other candidate.”¹⁸ Hayes's premonition turned out to be correct, and he was nominated on the seventh ballot essentially as a compromise candidate. He guaranteed the important state of Ohio and his personal and political lives were impeccably clean. As a reformist, he showed an interest in “clean bureaucracy” like Tilden, and his previous record in addition to his Victorian gentleman manner and scrupulous honesty were akin to the kind of character the Republicans needed after the scandal-exposing Grant administration.¹⁹ President Grant himself endorsed Hayes as “a good selection and will make a good candidate.”²⁰ Some party regulars, however, were not happy with the Republican selection; Joseph Pulitzer complained, “Hayes has never stolen. Good God, has it come to this?” Henry Adams

¹⁷ Morris 2003, 69-71.

¹⁸ Williams 1964, 26.

¹⁹ Josephson 1938, 221.

²⁰ Morris 2003, 83.

of the Liberal Republicans called Hayes “a third-rate nonentity, whose only recommendation is that he is obnoxious to no one.”²¹

The three-term governor of Ohio was not to be dismissed that easily – for he certainly was not a national party figure like Blaine, but neither was Democratic candidate Tilden. Furthermore, Hayes had the proper credentials to become president – he had been a successful criminal defense lawyer, a Union general who had been wounded in battle, and a member of Congress during Reconstruction where he was notable for his quiet party loyalty and detailed attention to the affairs of Ohio’s war veterans.²² Later he won the governorship of Ohio three times, the first and last of which he defeated one of Ohio’s most popular Democrats. While governor, he had dealt with a Democratic legislature and was successful getting the fourteenth and fifteenth amendments passed in Ohio, and he established what was later to become Ohio State University.

When Hayes released his letter of acceptance to become the Republican candidate for president, his platform was largely similar to Tilden’s: commitment to civil service reform, commitment to resumption of specie payments, commitment to nonsectarian public schools, and the usual equivocal statement about the South – the need for Southerners to control their own affairs, but also for the respect of constitutional rights for all citizens.²³ The inclusion of reform was especially important, because Hayes was able to draw back some of the Liberal Republicans who had bolted in 1872. Interestingly, Hayes also promised to only serve one term so that patronage could not be used to secure his reelection.²⁴ Not all Republicans embraced this principle though, for many thought that civil service reform could not take place in four years and the struggle for the presidency in 1880 could be as difficult for the Republicans as in 1876; furthermore, President Grant felt that Hayes was insulting his own two terms.²⁵

Thus, the parties of the American system in 1876 had chosen their respective contenders for the presidency; two men largely similar on the issues of that year but

²¹ Morris 2003, 83.

²² Polakoff 1973, 30.

²³ Rehnquist 2004, 82; Hoogenboom 1995, 266.

²⁴ Hoogenboom 1995, 266.

²⁵ Hoogenboom 1995, 266-267.

representing the two sides of the ideological struggle that still remained from the Civil War.²⁶

The Campaigns

True to the tradition of the day, after both Tilden and Hayes had composed their acceptance letters as presidential nominees, neither campaigned actively for himself and relied upon the party to do the necessary campaigning. In Hayes's camp were a respectable list of orators such as formernominees James G. Blaine and Benjamin Bristow, future presidents James A. Garfield and Benjamin Harrison, and even Mark Twain.²⁷ The Republicans, who realized the very grave prospect of the northern states of New York and Indiana (the states of Tilden and his vice presidential candidate Hendricks respectively) going to the Democrats in this election, once again found it prudent to "wave the bloody shirt" in their campaign for Hayes. Although Tilden had been a Union supporter, the Hayes campaign wanted to impress upon the electorate that while every Democrat had not been a rebel, every rebel had been a Democrat which in essence identified the Democratic Party as the party that brought on the Civil War.²⁸ One example of a "bloody shirt" speech utilized by the Republicans was:

"Every man that endeavored to tear the old flag from the heaven that it enriches was a Democrat. Every man that tried to destroy this nation was a Democrat...The man that assassinated Abraham Lincoln was a Democrat...Soldiers, every scar you have on your heroic bodies was given to you by a Democrat."²⁹

Civil service reform, however, was eventually deemphasized because Hayes realized that the few reformers who would vote for Tilden because of this issue would be inconsequential in comparison to lethargic rank and file Republicans who would now go to the polls in response to the bloody shirt.³⁰ As a complement to "the bloody shirt," Republicans also charged that a Democratic victory would result in turning over the

²⁶ Eckenrode 1930. 140.

²⁷ Eckenrode 1930, 145.

²⁸ Rehnquist 2004, 85; Haworth 1906, 40.

²⁹ Josephson 1938, 224.

³⁰ Hoogenboom 1995, 269.

United States to Confederate rule and also the federal payment of countless Confederate claims to wartime damages.³¹ Even Tilden, who had done much less for his campaign in comparison to Hayes, felt obligated to deny these false charges.

For their part, the Democrats virtually had their campaign material handed to them by the Grant administration. The number of scandals in the Grant administration numbered one hundred and one; moreover, the country was still deeply in depression from the Panic of 1873. Speakers for Tilden denounced the excesses of Republican rule, and contrasted the modestly priced Buchanan administration with the costly Grant administration.³² In short, the Democrats promised honest and economically efficient government if their candidate was elected.

The campaign of 1876 was modern in the sense that it focused on individuals – more specifically, an individual: Samuel J. Tilden. Though Hayes had a fine record himself, it would not be enough to overcome the recently marred record of the Republicans. Therefore, their only option was to wave the bloody shirt and to tarnish the Democratic candidate as much as possible. Tilden transcended his party in the months before the election, while Hayes was submerged in his party.³³

The Electoral Controversy

The first Tuesday in November of 1876 happened to be on November 7th of that year. Nearly eight and a half million Americans went to the polls on that first Tuesday of November, two million more than had voted in the 1872 contest.³⁴ Rutherford B. Hayes wrote in his diary that day, “A cold but dry day. Good enough here for election work. I still think Democratic chances the best – But it is not possible to form a confident opinion.”³⁵

Remarkably, Hayes had once again foreshadowed what was to come in his diary entry – for on November 8th, Tilden appeared to have won, but even his own party wasn’t one hundred percent sure of this result. Newspapers from around the country

³¹ Eckenrode 1930, 143-144; Polakoff 1973, 118.

³² Haworth 1903, 39.

³³ Eckenrode 1930, 146.

³⁴ Polakoff 1973, 199.

³⁵ Williams 1964, 46-47.

offered contrasting headlines from Democratic *New York Tribune's* "Ave! Centennial Sam! Complete Democratic Victory" to the Republican *Chicago Tribune's* "Lost. The Country Given Over to Democratic Greed and Plunder" to the Republican *New York Times's* "A Doubtful Election."³⁶ Despite its appearance as the maverick, the *New York Times's* claim of "A Doubtful Election" actually held weight – the known returns of the election at that point were far from complete, and the western states hadn't yet submitted any. Furthermore, the returns from three states – Florida, Louisiana, and South Carolina – were too close to call, so their electoral votes were given to neither candidate.

Nevertheless, it appeared as if Tilden had won. He carried all the states south of the Mason-Dixon line, excluding the doubtful three, as well as his home state of New York and Hendricks's home state of Indiana; plus neighbors Connecticut, New Jersey, Maryland, and Delaware, with a grand total of 184 electoral votes out of the 185 needed to win the presidency.³⁷ He had also won the popular vote by over 250,000 votes, or 51% of the ballots. Hayes retained the Northeast, the Midwest (except Indiana), and the West, albeit by smaller margins than Grant had carried them in 1872. His electoral count was 166. Nineteen electoral votes were at stake among the three close states, however, and if Hayes carried all three then the electoral count would be Hayes winning the presidency with 185 electoral votes over Tilden's 184, but if Hayes lost even one of these states then Tilden would be the next president.

No one who had seen the initial returns – not even Republican candidate Rutherford B. Hayes, who had gone to bed on November 7th thinking he had been defeated – thought that Hayes had won. The controversy of the nineteen electoral votes began largely on account of two significant players – General Daniel E. Sickles of the Republican Party and John C. Reid, managing editor of the *New York Times*. General Sickles had stopped by the Republican headquarters in New York City just before midnight on November 7th and had asked to see the dispatches from the various states. As he looked at the close returns from South Carolina, Florida, and Louisiana, he determined that by fair probabilities that Hayes could potentially have won all three

³⁶ Morris 2003, 164.

³⁷ Rehnquist 2004, 95. (See Appendix I)

states and the presidency. Given that these three states were the only remaining southern states with Republican governors, Sickles sent telegrams to the governors of all three states that said: "With your state sure for Hayes, he is elected. Hold your state." For his part, John C. Reid had come largely to the same conclusions as Sickles on his own. In addition to Reid's fanatical hatred of all Democrats, he received a doubtful telegram from New York State Democratic Chairman Daniel E. Magone that read "Please give your estimate of electoral votes secured for Tilden. Answer at once."³⁸ This alone was enough reason for Reid not to concede his paper to Tilden. Moreover, after meeting with Sickles and the rest at the Republican Headquarters, the *Times* had changed the totals on the bulletin board outside its office to indicate that Hayes had won the presidency, not Tilden.³⁹ The tides were beginning to turn, and even Rutherford B. Hayes privately proclaimed hope in his diary: "...It dawned on us that with a few Republican States in the South to which we were fairly entitled, we would yet be victors."⁴⁰

Within days, the major newspapers of the nation reneged on their previous headlines of a victory for Tilden. Zach Chandler, the Republican Party Chairman, sent out a telegram that read, "Hayes has 185 electoral votes and is elected."⁴¹ The Democrats were astounded, and some people called for the Democrats to arm themselves and march to Washington to install Tilden by force; "Tilden or Blood!" was their cry.⁴² Both candidates proceeded to act presidential and publicly remained silent throughout the controversy, though neither conceded defeat to the other either. President Grant called for "visiting statesmen"— e.g. prominent Republicans – to go to the states to monitor the vote canvassing, and the Democrats did the same. Grant also took steps to prepare for any armed threat to the government by amassing troops around the capital.⁴³ Finally, Grant issued a statement to General William Tecumseh Sherman that was subsequently printed in every newspaper in the United States:

³⁸ Polakoff 1973, 202-203.

³⁹ Morris 2003, 166.

⁴⁰ Williams 1964, 48.

⁴¹ Haworth 1906, 52

⁴² Morris 2003, 173.

⁴³ Morris 2003, 174.

“...Should there be any grounds of suspicion of fraudulent counting on either side, it should be reported and denounced at once. No man worthy of the office of the President would be willing to hold the office if counted in, placed there by fraud; either party can afford to be disappointed in the result, but the country cannot afford to have the result tainted by the suspicion of illegal or false returns.”⁴⁴

Controversy at the State Level

Grant’s notion of “illegal and false returns” was to paralyze the controversy into stalemate for many months following the election, for it was later going to be a problem getting the Democratic and Republican visiting statesmen to agree what constituted “illegal and false.” Similarly, it would be a huge problem discerning that either candidate had won a “fair and free” election.

In South Carolina, Hayes appeared to have won the election by 600 to 1000 votes, bolstered by the fact that blacks outnumbered whites in the state by a ratio of five to three. The problem for the Republicans was that in addition to the presidential race, there was an even more bitter governor’s race in South Carolina that Democratic candidate Wade Hampton appeared to have won by a larger margin than 1000 votes.⁴⁵ At that time in history, it was not likely that the winners for both the presidential and gubernatorial races would be of different parties in the same election; furthermore, Republican governor Daniel H. Chamberlain refused to concede that he had lost the race.⁴⁶ It also appeared that more votes were cast in South Carolina than there were eligible voters – the Republican state legislature had consistently refused to enact a state registration law, a complaint that the Democrats had had for some time.⁴⁷ In the Republicans’ favor, it was especially clear in the Palmetto State that Democrats had threatened blacks before the election – evidence of assault and arson against blacks emerged, as well as tactics known as “industrial proscription,” which effectively was Democrats announcing that they would not employ Republicans or rent land to them.⁴⁸ Nevertheless, the South Carolina canvassing board was composed of five Republicans,

⁴⁴ Haworth 1906, 55.

⁴⁵ Morris 2003, 175.

⁴⁶ Morris 2003, 175.

⁴⁷ Polakoff 1973, 219.

⁴⁸ Haworth 1906, 139.

three of whom had their own bids for reelection, and the Palmetto state subsequently went for Hayes. Interestingly, the canvassing board also validated the election of Democrat Wade Hampton, which has recently been cited as another corrupt bargain – a trade-off of the Republicans and Democrats giving the electors to Hayes on the condition of getting rid of Chamberlain.⁴⁹

Louisiana's returns elicited a big question mark. Despite a black majority in the state, Tilden had a lead of anywhere from 6000 to 8900 votes in the state – a difficult number for Republicans to surmount. Like South Carolina, there was evidence of Democratic intimidation – particularly evident by the killing of Henry Pinkston, a black – but there was also equally sufficient evidence of Republican fraud. Louisiana state law required membership of both parties in its canvassing board of five members, but the one Democrat on the board had previously resigned and the Republicans had not made an effort to replace him before the presidential election.⁵⁰ Moreover, Louisiana law gave the canvassing board absolute authority to decide which votes to count and which votes to throw out.⁵¹ The canvassing board allowed five observers from each side, but would not allow the Democrats to replace the vacant seat on the canvassing board.

If only to add to the chaos, it soon became known that the loyalty of the Louisiana canvassing board could be bought. J. Madison Wells, the presiding officer, had allegedly told the Democrats that the board would certify the Tilden electors for \$100,000 apiece for the two white members of the board and \$25,000 apiece for the two blacks.⁵² When the Democrats refused this offer, Wells gave the same deal to the Republicans, who also refused. When the canvassing board actually got to the business of counting votes, they ended up throwing out about fifteen thousand votes, thirteen thousand of which were Democratic, citing “systematic intimidation, murder, and violence toward one class of voters.”⁵³ By throwing out the returns in nearly all the parishes that gave clear majorities for Tilden and refusing to throw out the returns in

⁴⁹ Wallace 1942, 380.

⁵⁰ Rehnquist 2004, 107.

⁵¹ Morris 2003, 185.

⁵² Polakoff 1973, 213.

⁵³ Polakoff 1973, 214; Morris 2003, 191.

parishes in which the Republicans were shown to have committed frauds, the canvassing board gave Louisiana's electors to Hayes by three to four thousand votes.⁵⁴

Florida's vote was by the narrowest of margins of the three disputed states; its initial return was a ninety-one vote lead for Tilden. Like South Carolina and Louisiana, historians are certain that the Florida election was indeed not "fair and free," though the use of outright intimidation by Democrats was milder than the cases of South Carolina and Louisiana. Unlike South Carolina and Louisiana, Florida had a white majority that was fiercely committed to the Democratic Party.⁵⁵ Florida law dictated that a voter could cast his ballot at any poll in the county where he lived so that blacks could vote at the county seats under the protection of state and federal authorities, but the unwanted consequence was high levels of repeat voting, especially by Republicans, and the detection of which was virtually impossible.⁵⁶ On the Democratic end, there was liberal usage of Democratic ballots printed with the Republican symbol in order to trick illiterate voters.⁵⁷ Thus, fraud on both sides was demonstrated in Florida at the highest degree.

The state canvassing board of Florida consisted of state Attorney General William Cocke, a Democrat, and two Republicans. Similar to Louisiana, Florida's canvassing board had discretion to discount returns that were "irregular, false, or fraudulent."⁵⁸ The board worked in public, and indeed exercised its option to throw out some returns, either unanimously or by a 2-1 vote, the two Republicans always against the Democrat. In one particularly egregious episode, the board certified results from reliably Democratic Baker County as 130 votes for Hayes versus 89 votes for Tilden despite the fact that the board had in its possession another set of returns from Baker county that supplied contradicting information.⁵⁹ Thus, Florida's returns were certified for Hayes by a margin of only forty-three votes.

An unexpected dispute arose during this time in Oregon, a state that had always been put in Hayes's column. Both sides had conceded that Hayes had carried Oregon by more than one thousand votes, but the issue was that one of Oregon's Republican

⁵⁴ Eckenrode 1930, 189.

⁵⁵ Eckenrode 1930, 191.

⁵⁶ Polakoff 1973, 214.

⁵⁷ Hoogenboom 1995, 277.

⁵⁸ Rehnquist 2004, 104.

⁵⁹ Morris 2003, 194.

electors, John W. Watts, also held the office of postmaster – and thus was a federal employee – which violated the Constitutional clause that “No...person holding an Office of Trust or Profit under the United States shall be appointed an elector.”⁶⁰ To be sure, Watts’s position was of the fourth class in the small town of Lafayette earning a small salary of \$268 per year, but it was certainly in violation of the Constitution.⁶¹ Oregon had a Democratic governor and the Democrats saw this as a chance to retain the election that had been stolen from them. Indeed, Watts resigned as postmaster a week after the election and the Postmaster General Tyner telegraphed Lafayette F. Grover, governor of Oregon, and said:

“Upon careful investigation, the legal opinion is that the votes cast for a Federal office-holder are void, and that the person receiving the next highest number of votes should receive the certificate of appointment...”⁶²

The next highest vote receiver was E.A. Cronin, a Democrat, who was appointed by the governor to fill the vacancy. Thus, the two Republican electors voted for Hayes while Cronin voted for Tilden, and the return was then forwarded to Washington with Governor Grover’s signature. Grover validated his actions by claiming that because Watts was ineligible, there was never an incumbent and hence there was no vacancy.⁶³ Meanwhile, the two Republican electors filled the vacancy caused by Watts’s resignation by appointing Watts himself, since he had resigned both his postmaster and elector jobs. They subsequently cast three ballots for Hayes, which were not certified by the governor but by the secretary of state of Oregon. To be sure, the Democrats never really thought that the return that included E.A. Cronin’s electoral vote for Tilden would be certified; they hoped that the Oregon situation would force an investigation of all the electoral returns rather than merely deciding which returns to accept.⁶⁴

Congress required electors to cast their ballots in the state capitals on December 6. It was a routine procedure in thirty-four state capitals, but in Salem, Tallahassee, Columbia, and Baton Rouge, two sets of electors met and both forwarded their

⁶⁰ Morris 2003, 183.

⁶¹ Haworth 1906, 157.

⁶² Polakoff 1973, 226.

⁶³ Haworth 1906, 163.

⁶⁴ <http://elections.harpweek.com/09Ver2Controversy/Overview-2.htm>

conflicting votes to Washington, signed by various governors, governors-elect, secretaries of state, or no one at all.⁶⁵ Thus, Tilden still had 184 electoral votes and Hayes still had 165. The whole situation represented a mixed bag for the country, because in a truly “free and fair” election it was probable that Hayes would have won the election; in fact Hayes wrote in his diary,

“...If there had been neither violence nor intimidation, nor other improper interference with the rights of colored people, we should have carried enough Southern States to have held the country, and to have secured a decided popular majority in the Nation...There is no doubt that a very large majority of the lawful voters are Republicans. But the Democrats have endeavored to defeat the will of the lawful voters by the perpetration of crimes whose magnitude and atrocity has no parallel in our history...”⁶⁶

Conversely, had it not been for the odiously partisan methods of canvassing the votes utilized by the Republicans, Tilden would have won the election determined by ballots cast. When Tilden heard about the events of December 6 from his home in New York, he said, “Our presidential election has been subverted by a false count of votes cast by the presidential electors...”⁶⁷ The consensus of recent historians is that Hayes was probably entitled to the votes of South Carolina and Louisiana and Tilden to Florida, though it is impossible to speculate whether these results would have been yielded had the elections been free and fair.⁶⁸

Constitutional Crisis

Issues had arisen in choosing a president before, notably in 1800 and 1824, but in these two cases the Constitution offered a timely but procedural solution. 1876 presented a unique situation, for the Constitution was indeed silent about what to do when there were multiple certifications sent to Washington with conflicting results. The Constitution authorized that, “The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; the person having the greatest number of votes for President, shall be the

⁶⁵ Hoogenboom 1995, 279; Morris 2003, 198.

⁶⁶ Williams 1964, 50, 52.

⁶⁷ Morris 2003, 199.

⁶⁸ Woodward 1951, 19.

President.”⁶⁹ This Constitutional clause, like so many others, was ambiguous in its intentions – was it authorizing Thomas W. Ferry, the acting President of the U.S. Senate in 1876, to determine which results were valid? In this case, since Ferry was a Republican, Hayes would clearly be the next president. But the Constitution also could be construed that Ferry was just to open the returns, and in seeing that four states had multiple and conflicting returns he would have to declare that neither candidate had a majority of electoral votes and the contest would be placed in the House of Representatives, as dictated by the Twelfth Amendment. Then, since Democrats controlled the House, Tilden would be elected – but since Republicans controlled the Senate, where the vice president would be chosen, Hayes’s running mate Wheeler would be elected with Tilden.

Another issue that did not play a major role in 1876 but has since been studied by historians was the clear bias of the Electoral College in 1876 in favor of the Republicans. The apportionment of 1872 was not equitable in the states, and in fact in direct violation of a law mandating the equitable distribution of seats.⁷⁰ If apportionment had indeed been equitable for the election of 1876, none of the controversy would have arisen because Tilden would have already attained 185 electoral votes even without the disputed states.

As it was, however unfair for either side, a serious Constitutional crisis had indeed arisen. Given that the situation was beginning to aggravate tensions similar to those seen in 1860, it was crucial especially to the Republicans that a fair decision be reached. Instead of leaving the decision up to Ferry, both the Senate and the House each appointed bipartisan committees to investigate the returns in each of the original three disputed states with each committee to submit a majority and minority report. Unsurprisingly, the Republican-controlled Senate majority felt that Hayes was entitled to all three states while the Democrat-controlled House majority felt they belonged to Tilden. Partisan ties had indeed been maintained, and the stalemate resumed until after Christmas of 1876.

⁶⁹ *Amendments to the Constitution*. <http://www.house.gov/Constitution/Amend.html>, (accessed 18 November 2004).

⁷⁰ Argersinger 1989, 88.

During the month of December, Samuel J. Tilden had not remained idle. Although he had not actively engaged in the electoral controversy, he was certainly trying to promote his cause through the writing of a massive study of previous presidential elections titled *The Presidential Counts*. *The Presidential Counts* was given to every national legislator, and its conclusion was that the President of the Senate was not entitled to decide which electoral votes from a contested state, and instead the Senate and the House together had the ultimate authority to decide on this question.⁷¹ If decision could not be reached, Tilden maintained, then the election should be determined by the House of Representatives, as precedent of 1824 dictated. Although *The Presidential Counts* was a noble work, it had little value in settling the controversy in the end.

For his part, Rutherford B. Hayes was now firmly convinced that a fair election in the South would have yielded a Republican victory. He wrote in his diary, "No doubt a fair election would have carried [Louisiana] for the Republicans."⁷² While Tilden wrote *The Presidential Counts*, Hayes participated in his own fate by courting individuals who might affect his chances of becoming president, notably President Grant, who had already let it slip that he believed that Tilden had won the election.⁷³

In the middle of January of 1877, a solution to the crisis was finally agreed upon in the form of Electoral Count Bill of 1877. The Electoral Count Bill of 1877 stipulated a commission composed of five members from the House (three Democrats and two Republicans), five members from the Senate (three Republicans and two Democrats), and five members from the Supreme Court, four chosen based on geographical diversity and the fifth chosen by the other four.⁷⁴ The decision was to be legally binding unless overridden by both the House and the Senate. The commission would be evenly split along partisan lines, with the deciding votes clearly from the Supreme Court Justices. It was understood that two justices sympathetic to the Democrats and likewise two justices sympathetic to the Republicans would be part of the commission, with the fifth slot filled by Justice David Davis, a Lincoln appointee and widely regarded as an

⁷¹ Morris 2003, 204.

⁷² Williams 1964, 53.

⁷³ Morris 2003, 207.

⁷⁴ Harp Weekly, <http://elections.harpweek.com/09Ver2Controversy/Overview-3.htm> (accessed 21 November 2004).

independent. Neither Hayes nor Tilden was initially enamored with this compromise, but it was Congress that ultimately decided that the Electoral Count Bill would indeed be the deciding agent.

A surprise came to all parties involved when Davis announced that he would not serve on the commission, since he had not indicated any opposition to the bill during its passage. He had run for the Senate in Illinois (as an independent) which had resulted in another disputed election, and the Illinois legislature had recently pronounced Davis the winner.⁷⁵ Davis would not even consider serving on the commission – for it was a known fact he hadn't even voted in the recent presidential election – and he stated that if he should serve on the commission, then he would consider himself necessitated to decline his Senate seat, which he was not inclined to do.⁷⁶ Although this could be construed as a ploy by Davis to grant the presidency to the Republicans, there is no indication that his opinion on the matter was anything more than impartial. Thus, the last seat on the Electoral Commission was taken by Grant-appointee and Republican justice Joseph P. Bradley, and it seemed all but inevitable that Rutherford B. Hayes would be the next president of the United States.

Indeed, the inclusion of Justice Davis on the commission was what had made the Electoral Count Bill palatable to both parties, and now the Democrats saw the inclusion of Justice Bradley instead as clear partisan bias against their candidate. Nevertheless, the bill had been passed by Congress and signed by President Grant, and Bradley's vote was most likely going to be the deciding one.

Because Florida came first alphabetically of the four disputed states, its returns were debated first by the commission. The hearings on Florida went on for a solid week between February 1st and February 7th, and finally on February 7th a vote was taken. Bradley gave a speech before the vote, where he said:

“The two houses of Congress, in proceeding with the count, are bound to recognize the determination of the state board canvassers as the act of the state and as the most authentic evidence of the appointment by the state. While they may go behind the governor's certificate, if necessary, they can only do so for the purpose of ascertaining whether he has

⁷⁵ Morris 2003, 218.

⁷⁶ Rehnquist 2004, 159.

truly certified the results to which the board arrived. They cannot sit as a court of appeals on the action of that board.”⁷⁷

Clearly, Bradley was going to vote for Hayes. This was an obvious setback for the Democrats, since Florida was the state where Tilden’s claim was the most legitimate. A few minutes later, the vote was eight to seven in favor of Hayes – strictly along partisan lines. Although evidence from the other three states still hadn’t been heard, it was clear from Bradley’s speech that he did not intend to vote differently for the other contests. Hayes was going to be the next president.

A Compromise of 1877?

The Electoral College Commission’s decision was not the end of Election of 1876 debacle. By late February 1876, the Democrats’ chances looked bleak. However, the Democrats still held one card: they controlled the House of Representatives, and if they filibustered in the House then the counting would not be completed by March 4, the day that the new president was to be inaugurated. The threat of incomplete results by inauguration day was indeed grave – for in the failure to elect a president, the line of succession would be the president of the Senate, the Speaker of the House, and the Secretary of State.⁷⁸ No one wanted to think about what kind of calamity would ensue if neither Hayes nor Tilden were elected. Nevertheless, the filibuster never occurred – Speaker of the House Samuel J. Randall denied all motions to recess, reconsider, and call roll, and the southern Democrats would have defeated it anyway. The count was completed in the early hours of March 2, 1877 – a little over 48 hours before inauguration day.

American history books speak of a “Compromise of 1877” that took place among national politicians in response to the proposed filibuster by some Democrats. The Compromise of 1877 is usually simplified as a trade off between the Republicans and the Democrats: Hayes to be inaugurated as president in return for the end of Reconstruction. As is the usual case with simplifications, the trade-off version omits

⁷⁷ Morris 2003, 223.

⁷⁸ Eckenrode 1930, 228.

practically all of the contention among historians over the last century concerning the Compromise, for historians have not yet reached universal consensus over the matter.

The first version of the Compromise is somewhat similar to that of the simplification: it involves a meeting between Republican cronies and southern Democrats in a smoke-filled room at Wormley's Hotel in Washington, D.C., in which the Republicans agree to abandon the two remaining Republican state governments in the South (resolving the gubernatorial disputes in South Carolina and Louisiana) in return for the southerners' promise to defeat the Democratic filibuster, allowance of completion of the count, and the peaceful inauguration of Hayes.⁷⁹ Essentially, the southern Democrats were abandoning Tilden in exchange for control over two states, and the Republicans were abandoning the cause of the Negro in exchange for the presidency.⁸⁰ It is essential that one take this version of the Compromise in the context associated with it – this version portrays the country as practically being on the brink of another civil war, and the Compromise as the preventative solution to the tensions.

In 1951, C. Vann Woodward's *Reunion and Reaction* essentially revised this theory and redefined the natures of both parties. In his revision, Vann Woodward deems the events at the Wormley Hotel as an insignificant formality in comparison to the larger and mainly economic compromise that took place between Republicans and Whiggish southern Democrats. Vann Woodward theorized that many northern Republicans identified the "Whiggishness" of the emerging pro-business and pro-industry southern Democrats; that this sector in its ideology was essentially conservative and federalist but aligned with the Democrats over the white supremacy issue. These two groups, united primarily by economic interest, struck a bargain: withdrawal of the remaining carpetbag regimes, all of which were located in the three disputed states; the assurance of federal subsidies to aid Southern rehabilitation; the appointment of Democrats to patronage positions in the South; a promise of financial aid in the construction of the Texas and Pacific Railroad; the appointment of a Democrat to the President's cabinet; and finally, tacit admission that the South alone should

⁷⁹ Vann Woodward 1951, 7.

⁸⁰ Vann Woodward 1951, 7.

resolve its racial problem.⁸¹ Vann Woodward focuses much of his theory on the railroad interests; as the bargain was definitely not incidentally beneficial to the pro-industry Southerners and railroad promoters.

Vann Woodward also recognized that the bargain between the Northern Republicans and southern Democrats was a calculated effort to divide the Democratic Party – attempted even in the long term. Although the bargain did gain Hayes the presidency, the southern Democrats realigned solidly with their party in Congress following the election and the long-term hopes of party redefinition were dashed. Throughout his book, Vann Woodward emphasized the secrecy of these negotiations and that the results were primarily in the economic interests of the constituents involved as opposed to the seemingly race-driven motives on behalf of the southerners as in the traditional theory. Thus, Vann Woodward concludes that there was indeed a Compromise of 1877, but that it was fundamentally different than the traditional theory.

Vann Woodward's theory was widely accepted among fellow historians and history books since 1951 have tended to depict a version of the Compromise of 1877 as a simplification of *Reunion and Reaction*, but still other theories have emerged regarding the Compromise. One of these theories, offered by Allan Peskin, is that there was no compromise at all; for a deal whose major terms are never carried out is actually no deal at all.⁸² His evidence relies on Hayes' initial reluctance to remove the troops from the disputed states until the South had achieved "wise, honest, and peaceful local self-government."⁸³ His eventual removal of the troops was in accordance with both northern and southern public opinion that did not wish to sustain military occupation, as well as evidence that the troops in the South had become counterproductive.⁸⁴ Furthermore, Peskin argues, Hayes had indicated that he would govern according to the reform wing of the Republican Party, and patronage would be dispersed as he saw fit. Finally, the Texas and Pacific railroad was never built through the area of the South the so-called Compromise had discussed.

⁸¹ Peskin 1973, 64.

⁸² Peskin 1973, 65.

⁸³ Hoogenboom 1995, 298.

⁸⁴ Hoogenboom 1995, 305, 307.

According to Peskin, Democrats knew they were defeated after the Electoral Commission returned Hayes as the winner and they merely were trying to get as much as they could from their bargaining position. The Democrats observed that their outlets of hope were virtually used up – they couldn't appeal to the Constitution because the president of the Senate, who had the constitutional function of counting the presidential votes, was a Republican.⁸⁵ They couldn't appeal to the Supreme Court, which was dominated by Republicans, and they couldn't use force either with President Grant in office. They realized that the use of force would only affirm the Republicans' cry of the bloody shirt for an even more prolonged period of time. Thus, with the choice no longer between two candidates but between Hayes and chaos, they chose Hayes and the negotiation for southern home rule.⁸⁶

Bargain or no bargain, the Compromise of 1877 remains in U.S. history books as one of the great compromises of the Gilded Age. Both the Election of 1876 and the Compromise of 1877 provided significant evidence of what and how much was at stake for both parties at this point in history – and Hayes's success and failures in his presidential term indicate the importance of character under the mask of illegitimacy.

⁸⁵ Peskin 1973, 72.

⁸⁶ Peskin 1973, 65.

Chapter 3: The Presidency of Rutherford B. Hayes

Rutherford B. Hayes was not granted the traditional honeymoon period after being sworn into office. His illegitimacy was immediately propounded by the nation's newspapers, each vying to give the new president the catchiest name: "His Fraudulency," "Rutherfraud," "Old Eight to Seven," and "Returning Board Hayes" were among the most successful.⁸⁷ Given his already-tarnished image upon entering the White House, it is surprising to learn that he was a relatively popular president when he left office in 1881. This is not totally unexplainable; for there were no significant national crises while Hayes was in office, and his reformist attitude and honest demeanor lent to the restoration of prestige to the presidency after the scandals of the Grant administration. Furthermore, what much of the nation perceived as fraud in 1876 was undermined in 1880 when the Republican James A. Garfield won the presidency when blacks were most definitely disenfranchised in the South.

Hayes's first acts as president were directly relevant to the Compromise of 1877 – his executive appointments. Hayes was subject to the Tenure of Office Act and its consequence of a powerful Congress, though he showed presidential resolve right away when he refused to let powerful members of his party dictate his appointments. Keeping with his campaign promise but to the annoyance of Republican Stalwarts like Roscoe Conkling, Hayes nominated mostly reformists to his Cabinet. Many of his appointments were people who had helped him win the election – such as that of Attorney General Charles Devins, whose law partner had served on the Electoral Commission. It is also significant to notice that Hayes's passed over all of his opponents at the Republican nominating convention for any positions in his Cabinet. The most controversial of Hayes's appointments was that of Tennessee senator and Democrat David M. Key as postmaster general, which Woodward later claimed to be fulfillment of the Compromise of 1877.

Hayes's other important initial act as president was to construct a policy towards the South. In his inaugural address he stated, "The people of those States are still impoverished, and the inestimable blessing of wise, honest, and peaceful local self-

⁸⁷ Morris 2003, 241.

government is not fully enjoyed...But it must not be forgotten that only a local government which recognizes and maintains inviolate the rights of all is a true self-government.”⁸⁸ In principle, Hayes was not ready to remove the troops from the South. Consistent with his character, Hayes was genuinely sympathetic to the plight of the southern blacks and worried that they would not be able to exercise their constitutional rights under Democratic control. Unfortunately, there were stronger arguments for the removal than for sustaining the troops.

Contrary to the simplified theory of the Compromise of 1877, the end of Reconstruction did not occur under Hayes alone. Most of the end had come during the Grant administration, and only the carpetbag regimes of Louisiana and South Carolina remained by 1877. The problem for Hayes was that by removing the two Republican governors he was in effect undermining his own legitimacy, for the same canvassing boards that had declared him victorious also declared the two Republican governors victorious. On the other hand, restoring the authority of these Republican governors would require more troops in Louisiana and South Carolina – a plan that was not feasible due to hostile public opinion to a replenished military presence from both the North and South as well as the mere fact that the Democrats controlled the House of Representatives and already refused to appropriate funds to the military presence already there.⁸⁹ Furthermore, the troops in Louisiana and South Carolina had already become counterproductive and only served to further deepen the political divide between the races; harmony between the races would be impossible as long as the troops stayed. The removal of the troops during Hayes’s administration was inevitable, and to remove them later rather than sooner would only result in a hostile House of Representatives. Hayes removed the troops and forced the two Republican governors to abdicate their offices before the ides of April 1877. This move was harshly criticized by many, but Hayes’s decision was popularly supported overall by both northerners and southerners.

⁸⁸ <http://www.bartleby.com/124/pres35.html>

⁸⁹ Hoogenboom 1995, 305.

Having successfully implemented his Southern policy, Hayes wrote in his diary on April 22, 1877, "Now for civil service reform."⁹⁰ Hayes's battle for civil service reform would ultimately prove to be just as much about curbing Congress's power as it was about civil service reform. Hayes himself preferred radical reform requiring contestants to take competitive examinations without regard to party, claiming "He serves his party best who serves his country best,"⁹¹ but this would disrupt his party's firmly-rooted patronage system that had been in place since Jackson's presidency. Understanding that radical reform would be no reform at all since it would not pass in Congress, he took the moderate road by appointing a commission to investigate the New York, Philadelphia, San Francisco, and New Orleans custom houses. When it became clear that Hayes's old rival New York senator Roscoe Conkling did not intend to implement the reforms recommended by Hayes's commission, Hayes dismissed collector Chester A. Arthur. This, of course, enraged Conkling, and Hayes's relations with the Old Guard of the Republican Party deteriorated significantly. Hayes committed himself to battle when he announced an executive order that forbade federal employees from taking an active role in politics. Hayes's place in history commands general admiration for attempting to address civil service reform, though his actions at the time provoked much contempt and alienation between the president and his party. Actual legislation was not passed until 1883 after the assassination of Hayes's successor Grover Cleveland.

The most serious domestic crisis that emerged during Hayes's term was after only less than six months of office during the summer of 1877. The Great Strike, as it was called, was the United States' first national strike; it was precipitated by management of the railroad companies who faced growing pressures to cut costs due to sustained depression in the nation's economy and solved this problem by cutting wages by ten percent. Rioting, looting, burning, and bloodshed spread in urban centers across the country such as Baltimore, Pittsburgh and St. Louis. Hayes was initially not inclined to intervene because he believed that the strikes were a matter of state authority and not of federal authority until requested by the states.⁹² Hayes did eventually call federal troops, but placed them under the control of state authorities.

⁹⁰ Williams 1964, 87.

⁹¹ Josephson 1938, 238.

⁹² Hoogenboom 1995, 327.

These troops were ordered to neither provoke nor suppress the rioters, which allowed Hayes to truthfully claim that he was not taking the side of the railroads.⁹³ Furthermore, Hayes was careful not to halt the operation of the railroads, which allowed him to avoid any disagreements over the Constitutional powers of the president.⁹⁴

Though Hayes still faced the usual allegations of illegitimacy during the Great Strike especially by the media, his moderate solution to the crisis was generally applauded by all Americans. The public tended to blame management for the conditions that led to the Great Strike.⁹⁵ Hayes was clearly no Ulysses S. Grant, who would have put the strikes down with a heavy hand, but Hayes did recognize the limits of toleration of his party and offered nothing further to labor other than sympathy.

Besides Civil Service Reform, Hayes had another battle with Congress during his presidency: the currency question. The country still suffered from depression due to the Panic of 1873, and the controversial Resumption Act, which demanded that greenbacks be redeemed in gold in order to reduce interest payments and the federal debt, was to be enforced on January 1, 1879. Hayes supported the Resumption Act because he believed the return to the gold standard was fiscally necessary to discourage inflation; however, many others, notably the Democrats, did not.⁹⁶ The currency issue eventually took the shape of a bill in the House of Representatives called the Bland-Allison Act, which called for the limited coinage of silver. The Bland-Allison Act was passed by Congress in February of 1878 and enacted into law over Hayes's veto. Surprisingly, the currency issue was not embedded along party lines – it was more of a regional issue with Hayes's support coming mainly from the Northeast, even from his old foe Conkling. Nevertheless, even though Hayes suffered a minor political setback in the currency issue, he was ultimately able to compromise with his opposition by convincing them not to repeal the Resumption Act.

Hayes battle Congress about foreign policy in 1879 with the passage of the Chinese Exclusion Bill, which restricted immigration of the Chinese. Similar to the treatment of blacks in the South, the anti-Chinese sentiment in the West was primarily

⁹³ Hoogenboom 1995, 333.

⁹⁴ Hoogenboom 1995, 333.

⁹⁵ Hoogenboom 1995, 334.

⁹⁶ Hoogenboom 1995, 356-7.

due to racism; although this racism ~~as~~ ameliorated by factory owner preference of cheap Chinese labor over whites.⁹⁷ Hayes vetoed the Chinese Exclusion Bill on March 1, 1879, citing that its passage would be detrimental to relations with China and would also denounce the U.S.'s current treaty with China regarding immigration. Although he did not include it in his veto message, Hayes recognized the outright racism of the Chinese Exclusion Bill and felt that the bill violated the equal rights principle in the Declaration of Independence. He observed, "Our experience in dealing with the weaker races – the negroes and Indians for example is not encouraging. We shall oppress the Chinamen, and their presence will make hoodlums or vagabonds of their oppressors."⁹⁸ Congress could not override Hayes's veto because its session expired.

Hayes's veto did not cause much controversy except in the western areas where anti-Chinese sentiment was greatest. Hayes wrote in his diary, "The Veto of the anti Chinese bill is generally approved east of the Rocky Mountains, and bitterly denounced west of the mountains. I was burned in effigy in one town!"⁹⁹ Unfortunately, Hayes's veto did not close the Chinese question forever – in 1881, Congress passed a ten-year suspension of Chinese immigration to the United States.

Hayes became a hero for his party in 1879 when Democrats attempted to take advantage of their position as the majority party in both houses by repealing the election laws, which made hindering voters a federal offense. This action would have enabled Democrats to achieve the presidency in 1880. Their first method was first to pass an army appropriations bill with a rider that would prevent federal military and civil authorities from keeping peace at the polls.¹⁰⁰ After Hayes vetoed this rider, they passed a bill without a rider that would prohibit federal troops from keeping peace at the polls unless requested to do so by the state.¹⁰¹ Hayes vetoed this bill too, and neither time were the Democrats able to override the vetoes. Remarkably, it was these tricks of the Democrats that caused the Republicans to unite and rally behind their president – Hayes had never been so popular within the party, and the party itself strengthened

⁹⁷ Hoogenboom 1995, 387.

⁹⁸ Hoogenboom 1995, 389.

⁹⁹ Williams 1964, 192.

¹⁰⁰ Hoogenboom 1995, 394.

¹⁰¹ Hoogenboom 1995, 397.

because of it. It was perfect timing, too, because the 1880 campaign was just months away.

Conclusions

A politically astute person might come to the conclusion that Hayes's seemingly illegitimate election was the reason he was a one-term president. This, of course, was not the case – Hayes was in fact a one-term president because he had pledged during his campaign to be only a one-term president. As were the circumstances in 1880, Hayes may have easily abandoned his pledge and the outlook was that he would win. Nevertheless, Hayes never ran in 1880 and therefore couldn't win; but there is no evidence to show that Hayes's purported illegitimacy impacted in any way, positive or negative, the chances of his successor candidate in the 1880 election.

The media had cried "Fraud!" and Hayes had lost the popular vote, yet as Hayes left office in 1881 there was no rejoicing the end of an unpopular president. Rutherford B. Hayes, perceived as legitimate or not, was neither beloved nor vehemently deplored. His presidency was not great, but nor was its legacy considered poor. The reason that Rutherford B. Hayes's presidency surpassed its initial expectations was a combination of three things: a relatively peaceful four years, a policy of moderation, and traditional Hayes luck. Had the Republicans won the disputed election of 1876 with an Old Guard candidate who did not take the moderate path that Hayes took, at least three aspects of history could have been remarkably different: the 1880 campaign would have been especially bitter on both sides, with a probable Democrat victory; the prestige of the presidency would not have been improved; and the illegitimacy of the president would have been ingrained in history, unlike Hayes's own redemption through a moderately successful presidency and his moral and procedural executive manner.

It is impossible for historians to know who actually won the election of 1876. In the three disputed states that the Democrats cried "Fraud!" the Republicans could equally cry "Foul!"¹⁰² Yet, it is not implausible to assert that it truly did not matter who won the election of 1876, for the policies would have been nearly the same anyway. Hayes removed the troops, but so would have Tilden. Hayes advocated reform in

¹⁰² Peskin 1973, 72.

government, so too would have Tilden. Hayes supported hard money, and so did Tilden. It was indeed lucky for the American people that the most disputed election in U.S. history was between two reform-minded, upright candidates – for it resulted in a relatively peaceful, stable four years that most of the population didn't even remember from history class in the year 2000 when another disputed election occurred.

Chapter 3: The Election of 2000

On November 8, 2000, the forty-second president of the United States, Bill Clinton, declared to the American public, “The American people have spoken. It’s too bad it is going to take a little while to determine what it was they had to say.”¹⁰³ His reference was of course to the remarkable events that had taken place the day before – a virtual tie between the presidential candidates Vice President Al Gore and Texas Governor George W. Bush, and the result of the election still to be determined by who won the state of Florida.

In comparison to 1876, the stakes of the 2000 election were not all that high. Despite all the media frenzy of the coming of the new millennium (or the final year of the old one), the year 2000 proved to be a mere continuation of the 1990s – a time of relative peace and prosperity. Furthermore, the final two presidential candidates of 2000 – Vice President Gore and Governor Bush – did not provoke all that much enthusiasm from the American public, as both were regarded as centrist candidates who would in general continue the status quo. One commentator wrote:

“Both chief contending parties relied on focus groups and polls for their ‘issues’ and ‘messages’ and chose less than inspiring themes and foci for their campaigns. Both were financed by big corporations and represented only slightly different corporate agendas, and neither presented uplifting visions of social progress, justice, or democratic social transformation.”¹⁰⁴

It seemed as if the American public’s interest in national politics was at an all-time low; after all, only 49.0% of eligible voters had voted in the presidential race of 1996, the second-lowest participation of the twentieth century (the lowest was in 1924). The only factor that seemed capable of increasing this number was the fact that the election of 2000 was a race that did not feature an incumbent – though it seemed as if it did, since Al Gore was Clinton’s vice president and an integral part of the administration.

Nevertheless, the final election of the twentieth century was to go down in history books as one of the most controversial elections of U.S. history, notorious not for any

¹⁰³ *The Guardian*, http://www.guardian.co.uk/US_election_race/ (Accessed 23 March 2005).

¹⁰⁴ Kellner 2001, xiii.

ideological differences between the candidates but for its spectacular thirty-six day stalemate after November 7th and its result that was ultimately determined by the United States Supreme Court. It would change the way that both U.S. citizens and the international community would view United States democratic institutions that had been in place for over two hundred years – and it would teach people that every vote does indeed count. And though not much seemed to be at stake during the campaign in 2000, U.S. citizens would realize less than a year later that the victor of the 2000 election (ultimately George W. Bush) would be the leader of a new era in U.S. politics – the post-September 11, 2001 era.

Democratic Candidate Vice President Al Gore

Albert Arnold Gore Jr. was the de facto candidate for the Democratic Party in 2000, following the twentieth century trend of vice presidents running for president. He had begun his efforts towards seeking the nomination in 1999, but unfortunately the impeachment trial of Bill Clinton overshadowed his aspirations at this time.¹⁰⁵ The outlook was good for Gore – President Clinton's eight year tenure had been stable, peaceful, and prospering, marred only by Clinton's sex scandal. Indeed, a continuation of the status quo seemed to be what American citizens wanted in 2000 – what many analysts contended to be "a continuation of Clinton's policies, without Bill Clinton."¹⁰⁶ It was Gore's task to delicately remove himself from Bill Clinton's moral problems, yet take credit for Clinton's policies – early projections asserted that a win was all but guaranteed if Gore accomplished this balancing act.

Though his nomination was all but ensured, Al Gore was not about to get off easily during the primary season. He was challenged by New Jersey Senator and National Basketball Association Hall of Famer Bill Bradley, who emphasized a liberal program, ("The economy soars, but some of us are left behind") as well as a promise for "a new kind of leadership that puts people front and center– not the president."¹⁰⁷ Bradley, like Gore, was regarded as a political centrist, but in his efforts to capture the

¹⁰⁵ Dover 2003, 103.

¹⁰⁶ Ceaser and Busch 2001, 37.

¹⁰⁷ Ceaser and Busch 2001, 62.

nomination he attempted to shift leftward and appeal to the more liberal wing of the Democratic Party. Unfortunately for Bradley, Gore had accumulated a large amount of money as well as many endorsements early in the campaign, and of course had the huge advantage as being a key member of the incumbent's successful administration. Furthermore, Bradley had the extremely difficult task of attracting and building a new constituency within the Democratic Party that was not tied to the Clinton administration, which produced a constituency made up of those tied to organized interests as well as many independents.¹⁰⁸ Given the magnitude of these disadvantages, it is surprising to note that Bradley lost to Gore in the first primary, New Hampshire, by only four points. This close loss, however, turned out to be the zenith of Bradley's campaign – he was handily defeated in the next two primaries, Delaware and Washington, as well as all the primaries on Super Tuesday. He finally withdrew from the race on March 9, 2000, two days after Super Tuesday.

Vice President Gore had excellent credentials to become the forty-third president of the United States. Born to a veteran Tennessee senator Al Gore Sr., Al Jr. became used to shuttling back and forth between Tennessee and Washington, D.C. as he grew up. He attended Harvard University and graduated with a BA in government in 1969, and later attended Vanderbilt Divinity School and Vanderbilt Law School, though he did not receive a degree at either. Although he was opposed to the Vietnam War, civic duty compelled him to enlist in the army after he graduated from Harvard in 1969. He served in the army for two years, although he was only in Vietnam briefly in 1971 as a military journalist. In 1976, he quit law school to run for Tennessee's Fourth District in the U.S. House of Representatives. He defeated Stanley Rodgers in the Democratic primary, then ran unopposed and was elected to the House. He was elected to the House three subsequent times, and served through 1984 when he ran for the Senate and won. He was Tennessee's Senator until 1992, when he was elected Vice President. He attempted a presidential bid in 1988, but was defeated in the primaries by Michael Dukakis. Tragedy struck in 1989 when his young son was killed in a car accident, which caused Gore's decision not to attempt another bid at the presidency in 1992.

¹⁰⁸ Ceaser and Busch 2001, 59.

Gore's election to the vice presidency in 1992 marked a shift from the traditionally less-significant "balancing the ticket" role of vice presidents in national politics to a more influential "team player" that has become evident in the Clinton/Gore and Bush/Cheney administrations. Gore was certainly an active player in the Clinton administration; he was a strong advocate for the environmental movement and helped make up for Clinton's lack of foreign policy experience, since Gore had served in Vietnam. His major accomplishments included helping Clinton downsize the bureaucracy of the federal government, his role in the passage of the North American Free Trade Agreement (NAFTA), a program calling for all schools and libraries to be wired to the internet, and his role in foreign policy involving Yugoslavia.¹⁰⁹

After securing the Democratic nomination, Gore's next task was to unveil his strategy on how he was going to beat Governor Bush on the issues of the day. At the 2000 Democratic National Convention in Los Angeles, Gore had revealed that he was going to "be his own man" – clearly an attempt to separate himself from Clinton, both from the Clinton scandals as well as to demonstrate his own capabilities. In addition, he spoke about his vision of "a better America," in which he would be a fighter on behalf of the people against the powerful, and of his intentions to extend Medicare to pay for prescription drugs, to work towards universal health care, to lower crime, and to downsize the military and make it more efficient.¹¹⁰ A notable break with Clinton evident in his convention speech was his "populist" theme, which many feared would be a return to the era of big government. He chose Senator Joseph Lieberman of Connecticut as his running mate, which proved to be a somewhat dramatic choice since Lieberman was Jewish. However, his choice of Senator Lieberman indicated his firm commitment to the integrity of his campaign since Lieberman had a reputation as a strong moral leader and had been one of only a few Democrats to seriously reprimand Clinton during his impeachment trial.¹¹¹

On the campaign trail, the major issues that arose were the economy (the current prosperity, tax cuts, and the fate of social security), and education. He wanted to

¹⁰⁹ Ibid.

¹¹⁰ Wikipedia Encyclopedia, http://en.wikipedia.org/wiki/Al_Gore_presidential_campaign%2C_2000#Campaign_Platform, (accessed 23 March 2005).

¹¹¹ Sabato 2002, 28.

showcase that the economy under the Democrats had improved greatly, and what was once a large budgetary deficit was now a surplus. Furthermore, social security needed to remain intact and protected. He also attacked Bush's tax cut plan, of which he deemed only benefited the super-wealthy. Instead, he promoted his own moderate tax cuts for the middle class. As for education, Gore supported strengthening public schools through a rigorous hierarchy of accountability: the states, the schools, the teachers, and the students. Moreover, he promoted extended testing in order to identify successful and failing schools, and to reward the successful ones and help the failing ones. Other issues of importance were of the traditional Democrat/Republican divide, including abortion, gay rights, gun control, the environment, and the size of the military.

Republican Candidate Governor George W. Bush

While the Democratic candidate of the year 2000 was largely a forgone conclusion, the battle for the Republican nomination was far more exciting. The Republicans had not held the nation's highest office in eight years, and they faced the task of constructing an appealing political ideology as well as finding a solid candidate. Governor George W. Bush, oldest son of forty-second president George H.W. Bush, was the early favorite, but in order to gain the nomination he had to overcome his five opponents. His five opponents were: Senator John McCain of Arizona, Steve Forbes (a wealthy publisher), Alan Keyes (former deputy secretary of state), Gary Bauer (former domestic policy advisor to Reagan), and Senator Orrin Hatch of Utah. Nevertheless, Governor Bush held the cards: he had a recognizable family name, he was governor of a large state with many electoral votes (Forbes, Keyes, and Bauer lacked elected office experience), he had compiled a huge amount of campaign money from extensive fundraising, and he had received by far the most endorsements – thirty-six out of fifty-five Republican senators in addition to the endorsement of the thirty-one member Republican Governors Association.¹¹² The only area in which George W. Bush lacked was the media's obvious bias towards Senator John McCain, who had worked hard to cultivate its support, though the media did recognize Bush as the front-runner.¹¹³

¹¹² Ceaser and Busch 2001, 68.

¹¹³ Ceaser and Busch 2001, 70.

Since Bush was the front-runner, strategy dictated that his five challengers attack him. All but John McCain attacked Bush from the right, which made Bush look centrist and certainly helped him later in the campaign.¹¹⁴ The fact remained that only Bush, Hatch, and McCain of the six were plausible nominees, for the Republicans were not likely to waste the opportunity of a race without an incumbent on a candidate who had never even held elected office. Hatch too did not have much of a chance because he was not fully trusted by most conservatives for the following reasons: his close relationship with Massachusetts Senator Ted Kennedy, his approval of Clinton's liberal judicial appointments, and his Mormon beliefs, which bothered many on the Christian right.¹¹⁵ All that remained were Senator McCain and Governor Bush.

Although lacking in endorsements and campaign funds in comparison to Bush, Senator McCain posed a real threat to the governor. He was a staunch conservative on military and social issues, yet more liberal on fiscal issues – overall, a more moderate candidate than Bush. He had eighteen years of experience in Congress – Bush only had five years of experience as governor – and his life story, particularly his five years as a prisoner of war in Vietnam, could not be matched. He had garnered the media's affectionate label as a “maverick,” and his aggressive position on campaign finance reform and attacks on Bush's tax cuts as fiscal recklessness made him a viable alternative candidate. Upon taking on an incumbent and twelve years of Republican primacy, Bill Clinton had moved to the right of traditional Democrats; could the appropriate strategy for Republicans in the year 2000 be to choose a very centrist Republican who may be able to capture a sizeable chunk of Gore's votes? McCain's performance during the primaries would test this theory.

Unfortunately for McCain, his simultaneous liberal and conservative appeal did not suit the traditional Republican base. The February primaries were deceiving because they allowed both Democrats and Republicans to vote in them, and it seemed as if there was going to be a tight race. Bush won the Iowa caucus, and McCain retaliated with a big victory in New Hampshire, 49% to 31%. Then Bush won in South Carolina, but McCain won in both Michigan and Arizona. The final February primaries,

¹¹⁴ Ceaser and Busch 2001, 71.

¹¹⁵ Ceaser and Busch 2001, 64.

North Dakota (the only closed primary of February), Virginia, and Washington, proved almost divisive for Bush's lead as he won all three. After some anti-Christian conservative outbursts, McCain was bulldozed on Super Tuesday when he lost every primary (all closed). Though he had done quite well with independents and Democrats, McCain had failed to win the Republican vote and could therefore not capture the nomination. He withdrew from the race on March 9. Thus, Bush stood as the final candidate out of the frenzied pool of Republicans.

Although George W. Bush did not have quite an impressive list of credentials as Gore, his credentials were indeed strong enough. Moreover, he had the advantage of being a new and fresh candidate who had not been tainted by the institutionalism of national politics. His family had long been connected with the Republican icon, Ronald Reagan, and claims to being the heir of Reagan seemed more authentic coming from him than anyone else. His achievements, for the most part, matched Al Gore's – an Ivy League education at Yale, a stint in the Texas National Guard during the Vietnam War, and a Masters of Business Administration from Harvard. At this point, Al Gore entered Congress while George W. Bush tried his hand at becoming a businessman and was moderately successful, overcoming an insider-trading scandal and becoming managing partner of the Texas Rangers.

In 1994, Bush defeated incumbent Democrat Ann Richards for the Texas governorship, and was reelected in a landslide in 1998. As governor, he was noted for his success at working with constituencies of both parties. His harsh stance on crime, drugs, and the death penalty, along with large tax cuts and welfare reform with sterner work requirements, endeared him to conservatives; while his state spending especially on education and bilingual programs satisfied Democrats.¹¹⁶ Bush's accomplishments in Texas persuaded many Republicans that he could unite them and win the presidency.¹¹⁷

As candidate for president essentially in opposition to an incumbent administration, George W. Bush was compelled to create a platform of mostly new initiatives in order to attract voters. His overarching theme was "compassionate

¹¹⁶ Texas State, <http://www.tsl.state.tx.us/governors/modern/page3.html> (Accessed 23 March 2005).

¹¹⁷ Dover 2003, 7.

conservatism,” or the aim for a society that allows people to help themselves rather than rely on government for their needs.¹¹⁸ He deemed himself a “new kind of Republican” to put symbolic distance between himself and Congressional Republicans, who were identified significantly with a negative “less government” approach.¹¹⁹ He challenged Al Gore by identifying his ties to Clinton, and implied Gore and Clinton both shared the same character problems. His strategy was to challenge traditional Democratic issues in order to neutralize Gore’s campaign.¹²⁰ Some of the issues of his platform were: allowing religious charities to compete on an equal basis for participation in federally funded programs, a large tax cut, promoting the use of vouchers for private schools, supporting oil drilling in the Arctic National Wildlife Refuge, maintaining a balanced federal budget, and restructuring the military.

Bush chose veteran politician and former Congressman Dick Cheney as his running mate. Like Gore’s choice of Lieberman, the choice of Cheney would not help Bush pick up any electoral votes he otherwise wouldn’t have had, for Cheney was from Wyoming which was safely in Bush’s electoral column. Cheney was former White House Chief of Staff and former Secretary of Defense, and certainly made up for the experience in foreign and domestic policy that Bush lacked.¹²¹ Moreover, Cheney was simultaneously associated with both the moderate and right Republican wings. Bush’s choice of Cheney demonstrated that Bush was looking past politics of the election to the job of governing, which reassured many Americans.¹²²

The Campaign

Since almost a century and a quarter had passed since 1876, the presidential campaign had evolved into an entirely new being. Party conventions were now of less relevance, since the candidates had essentially been chosen during the primaries. The modern campaign, as fought in 2000, consisted of three main elements: the party

¹¹⁸ Wikipedia Encyclopedia, http://en.wikipedia.org/wiki/Compassionate_conservativism (Accessed 23 March 2005).

¹¹⁹ Ceaser and Busch 2001, 116.

¹²⁰ Ibid.

¹²¹ Sabato 2002, 27.

¹²² Sabato 2002, 28.

conventions, the debates, and on-the road campaigning in the summer and fall and portrayal by the media.

The Republican and Democratic conventions of 2000 were held in Philadelphia and Los Angeles respectively. Whereas the initial purpose for conventions had been to choose a candidate and platform, the modern convention was essentially a “four-day infomercial” as CBS’s Dan Rather dismissively called it.¹²³ Conventions are hardly irrelevant, however, for they offer the chance for the candidate to present himself and his ideas to the American people, and to showcase the important people who support him. The Republican convention tried to shed the party’s hard-right “Gingrich” image through a theme of “Renewing America’s Purpose. Together.”¹²⁴ True to Bush’s entire campaign, the convention was meticulously crafted and featured such endorsements as Presidents Gerald Ford and George H.W. Bush, General Colin Powell, Elizabeth Dole, and former rival John McCain. Most importantly, Bush came off very well (“presidential”) in his acceptance speech – and his healthy boost in the polls after the convention reflected that. Shortly afterward and on the other side of the country, the Democrats convened in Los Angeles. Gore had been consistently behind Bush in the polls by this time, and needed badly to define who he was and separate himself from Clinton. Remarkably, Gore and the Democrats worked magic at their convention, with the help of speakers such as Bill Clinton, Ted Kennedy, Jesse Jackson, Bill Bradley, and Tipper Gore. Al Gore himself delivered an energizing acceptance speech that clearly contrasted his positions on issues with Governor Bush’s, and then separated himself from President Clinton by providing the image of a populist, Old Democrat. Furthermore, the astounding seven-second kiss between Al and Tipper Gore symbolized his love and faithfulness to his wife, in direct contrast to Clinton’s infidelity. For the first time in several weeks, Al Gore surged past Bush in the polls.

By the time of the second element of the modern campaign, the debates, Gore and Bush were tied at the polls. Although there is no declared “winner” of presidential debates, the media often brought in analysts to speculate on who they thought “won” as well as conducting extensive polling on who Americans thought “won.” In general, Gore

¹²³ Kellner 2001, 2.

¹²⁴ Sabato 2002, 31-2.

is thought to have won two debates and Bush to have won one, but the debates actually hurt Gore even though he supposedly “won.” This seeming paradox occurred because Gore was reputed to be the more articulate debater and more intelligent than Bush before the debates, and when Bush’s performance surpassed expectations, he certainly gained. This was especially true in the foreign policy debate, in which Bush was perceived to be quite capable though he lacked Gore’s substantial experience. Furthermore, Gore’s aggressive approach in the first and most widely viewed debate, such as frequent interruptions of Bush, eye rolling, and disgusted facial expressions, indicated elitist behavior and disrespect for his opponent, which did not help his cause to improve his character points. The one vice presidential debate, on the other hand, was a polite, respectful, and knowledgeable display by both Cheney and Lieberman, and both men came out in a very positive light – perhaps more positive than their respective running mates.

The third element of the modern campaign is the general media portrayal of the candidates. In retrospect, the consensus is that the media on the whole tended to favor Bush during the campaigns. This is exemplified by the ratio of positive and negative media stories, which both favored Bush. The comeback of right-wing talk radio successfully projected its hatred of Clinton onto Gore.¹²⁵ Moreover, there was no comparable “left-wing” radio, as there were far more conservatives than liberals on the airwaves. Bush was also capable of turning character into an issue, of which he won decisively helped by the media’s portrayal Gore as robotic and Bush as charismatic.

Although Bush received the more favorable media on the whole, neither he nor Gore was spared the satiric media. On *Saturday Night Live*, the comics had a field day depicting Bush as the dumb, smiling Daddy’s boy “Dubya,” and AlGore, the stiff and exaggeration-prone vice president.¹²⁶ Overall, the caricatures of the two were similar to the *Saturday Night Live* portrayal – Bush as an unintelligent idiot, and Gore as a serial exaggerator. Unfortunately, Bush himself could also utilize the Al “I invented the internet” Gore image to his advantage, whereas it would certainly be seen as mean-spirited if Gore emphasized Bush’s comparative lack of intelligence.

¹²⁵ Kellner 2001, 10.

¹²⁶ Kellner 2001, 7.

The Election Night Debacle

The election night chaos of 2000 occurred on November 7, 2000 – exactly 124 years to the day after similar chaos in 1876. As per usual, the networks were armed and ready with their teams of analysts, scoreboards, and red and blue digital United States maps. Each network tried to reel in viewers early on with promises of fast and accurate results, with CBS's Dan Rather proclaiming, "If we say somebody's carried the state, you can take that to the bank."¹²⁷ These words would prove to be ominous.

The night began terribly for Bush as the networks called three battleground states, Michigan, Pennsylvania, and Florida, for Gore. Dan Rather commented, "Bush's prospects of winning are shakier than cafeteria Jell-O."¹²⁸ Soon after, Bush told reporters he was skeptical of the network calls of Florida, where his brother Jeb was governor, and Pennsylvania, where his friend Tom Ridge was governor.¹²⁹ Bush's speculations proved accurate when around 10 pm, to the horror of the Gore supporters, the networks confessed that their previous call for Florida was based on faulty data and placed Florida back in the undecided category.¹³⁰ It was declared around 11 pm that the Republicans had won the House of Representatives, while the Senate looked to be heading for a tie. As the night dragged on, it became clear that whichever candidate won Florida would become the next president of the United States. Shortly after 2 am, the networks, led by Fox, proceeded to call Florida for Bush – thus presumptively making him president-elect. Dan Rather commented, "Sip it, savor it, cup it, photostat it, underline it in red, press it in a book, put it in an album, hang it on the wall. George W. Bush is the next president of the United States."¹³¹

After Florida was called decisively for Bush by the networks, Vice President Gore assumed he had lost the election and called Governor Bush at his mansion in Austin to concede and extend his congratulations. Shortly after, Gore's strategists called to

¹²⁷ Kellner 2001, 21.

¹²⁸ Kellner 2001, 22.

¹²⁹ *New York Times* Correspondents, 8 November 2001, 2.

¹³⁰ Ibid.

¹³¹ Kellner 2001, 23.

inform him that Bush's advantage in Florida was only 6000, with many precincts still out. As the story was later recalled,

"...At 2:30 AM, Gore [called] his Republican rival and told him that circumstances had changed in the last 45 minutes. The race, Gore said, was now too close to call, and there would be an automatic recount in Florida. He was going to wait it out. 'You mean to tell me, Mr. Vice President, you're retracting your concession?' Bush asked, his tone incredulous, one aid said...'You don't have to be snippy about it,' Gore responded...Bush told Gore that his brother Jeb, the governor of Florida, had just assured him that Florida was his, Gore aids said. 'Let me explain something,' Gore said. 'Your younger brother is not the ultimate authority on this.' The conversation drew quickly to a close. The election did not."¹³²

In the next few hours of the night, Gore picked up more electoral votes and surged ahead in the popular vote. Gore was now winning the electoral vote, 267-246 with Florida undecided. The next morning, those who had gone to sleep after the networks had declared Bush to be president were surprised to learn that the election was unresolved, and probably wouldn't be resolved for days. Others read newspapers that had not been recalled from the printing presses when the networks recanted on Florida that declared Bush as the victor, though the televised news told a story of impending recounts. The fate of the presidency depended on the verdict in Florida, where an incomplete count had Bush leading by a scant 1,784 votes out of more than six million cast in the state.

Although the election of 2000 would ultimately involve much finger-pointing, the blame for the debacle on election night can safely be bestowed on the media and Voter New Service (VNS). Each network, in its race to be the first with new results, made some extremely dubious calls on election night. The VNS projections also turned out to be faulty, as in the Florida case when VNS called Florida for Gore based on the projection that Gore would take the lead in the state when the returns from the more populous Democratic counties were included.¹³³ When it became apparent that Gore was not gaining fast enough to overtake Bush, the networks removed Florida from

¹³² *New York Times* Correspondents, 8 November 2001, 3-4.

¹³³ Dover 2003, 17.

Gore's column. In addition, it was later discovered that Bush's cousin John Ellis who worked for Fox had helped make the call for Bush, and that Fox had made the call without VNS polling data.¹³⁴ These were highly unfortunate circumstances for Gore, who would ultimately have to overcome the presumption that Bush had won the election in order to fully prevail in his efforts.

The Florida Controversies

Overview: Florida is the U.S.'s fourth most populous state, differing from other populous states because it is not dominated by a single metropolitan area (like Chicago in Illinois or New York City in New York), and its population is instead distributed among several regional centers.¹³⁵ It is highly diverse ethnically and religiously, with large numbers of Protestant and Jewish retirees, Cuban Americans, African Americans, and both blue and white collar whites. Gore ran the best in industrial, university, and governmental cities such as Miami, Tampa, St. Petersburg, Tallahassee, and Gainesville.¹³⁶ Bush ran the best in Pensacola and Jacksonville, which have large military installations; the rural areas of the state; the affluent retirement communities of Sarasota and Fort Meyers; and the Cuban American parts of Miami.¹³⁷ The regions of Florida without dominant social groups, such as Orlando and Daytona Beach, divided their support between the two candidates evenly.

The Palm Beach "Butterfly Ballot": The first anomaly of the presidential election in Florida became evident by November 8: a confusing and possibly illegal ballot used in Palm Beach County (see Appendix). Florida law required that the names of all candidates for any partisan elected office in a given election had to be listed on the ballot in the order in which each political party's candidate for governor had finished in the most recent election for that office.¹³⁸ The Palm Beach ballot had an unusual format of candidate names listed on columns, one to the left and one to the right, of the perforations in the middle where the punch-card vote was to be recorded. The

¹³⁴ Kellner 2001, 23.

¹³⁵ Dover 2003, 16.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Dover 2003, 38.

reasoning behind this layout was that Theresa La Pore, a Democrat county clerk, was afraid that listing ten candidates in one column would require a small print that many elderly voters in Palm Beach County would be unable to read. The problem with the ballot was that it did not correspond to the legally required rank – since Jeb Bush, a Republican, had won the last governor’s election, George W. Bush was supposed to be listed first and Al Gore second – but in fact to vote for Al Gore, one had to punch the third hole, even though Gore was listed directly below Bush. The candidate who occupied hole #2 was Pat Buchanan, which violated the law since the Reform Party had not received the second-highest amount of votes in the last governor’s election. Pat Buchanan, who had never even campaigned in Palm Beach County, finished with 3,704 votes in the steadfastly Democratic county – nearly 2,700 more than Buchanan had received in any of Florida’s other sixty-six counties.¹³⁹

The Palm Beach butterfly ballot created havoc on both Election Day and the following day. Scores of voters confused by the ballot voted for candidates other than the one they wished to support, and some who had discovered their errors tried to remedy them by punching again for their true intentions (“overvotes”), which disqualified their ballots since they had cast two votes for president. In an affidavit for the subsequent lawsuit, one woman wrote:

“I had reviewed the sample ballot before going to the polling place, and had even gone through training to serve as a poll worker. Even though I was familiar with the sample ballot and had voted many times before, I found the ballot I received on November 7 very confusing. It did not correspond to the sample ballot I had received...because I was so confused, though, I asked a poll worker for assistance lining up the holes on the ballot properly, and informed her that I was having trouble lining up the holes to see which hole I should punch to vote for Vice President Al Gore...She did not provide me with the assistance I requested in lining up the ballot in the voting machine, and just told me I should ‘punch the hole near Vice President Gore’s name’ in order to vote for him. This was not at all helpful to me, since my problem was that I could not tell which was the hole nearest to Vice President Gore’s name...I punched the second hole on the ballot, believing that to be the correct hole to punch in order to vote for [Gore]

¹³⁹ *New York Times* Correspondents 8 November 2000, 10.

since it was listed second on the ballot. I was not certain I had voted correctly, but I was ashamed to ask for help again, especially since the poll worker had refused to help when I first asked for assistance. My husband...noticed my confusion and told me that a poll worker had informed him that the proper way to vote for [Gore] was to punch both the second and third holes on the ballot in order to vote for both Vice President Gore and Senator Lieberman. This seemed very unusual and surprising to me, but I believed it since I understood it was what the poll worker had instructed us to do."¹⁴⁰

The Bush team contended that the dramatic showing for Buchanan in Palm Beach County was the true intent of the voters. However, Palm Beach County has a sizable elderly Jewish population, and it is very difficult to believe that so many Jewish voters would support a candidate who once wrote a book criticizing the U.S. for entering World War II against Germany instead of Al Gore's running -mate Joe Lieberman, an orthodox Jew. Statistical analysis based on the absentee ballots (which were not of the butterfly format) as the control group later revealed that people who voted on Election Day in Palm Beach county were over four times as likely to vote for Buchanan than those who voted in the county via absentee ballot.¹⁴¹ Moreover, there were an additional 5,264 overvotes for Gore and Buchanan, 2,862 overvotes for Gore and McReynolds of the Socialist Party (the hole directly below Gore's), and 1,319 overvotes for Gore and Libertarian Harry Browne (listed directly below Gore, two holes down from Gore).¹⁴² The combined effects of the problematic Buchanan vote in addition to the overvote may have cost Gore as many as 10,000 votes, and certainly the election.

The result of the butterfly mayhem was votes for third party candidates unintended by voters, and 29,000 votes in the presidential election of Palm Beach County thrown out due to no record of a presidential vote ("undervote") or an overvote, totaling 4% of votes cast in the county.¹⁴³ The problems of the butterfly ballot did not afflict the vote for Governor Bush in the same way since he was listed first on the ballot and corresponded to the first hole, and therefore had less chance of voter confusion.

¹⁴⁰ Brady, Herron, Mebane, Sekhon, Shotts, and Wand 2001, 65.

¹⁴¹ Ibid.

¹⁴² Dover 2001, 40.

¹⁴³ *New York Times* Correspondents 8 November 2000, 10.

Statistical analysis confirmed this. On November 8, 2000, three angry Palm Beach residents who said they mistakenly voted for Buchanan when they had intended to vote for Vice President Gore filed a lawsuit in the state circuit court challenging the validity of the Palm Beach vote.¹⁴⁴ This lawsuit was not associated with the Gore team.

Although the Palm Beach ballot was a huge issue and most people think its difficulties cost Gore the election, there were very few options for the Gore team to pursue. There was virtually no way to disentangle the Gore vote from the Buchanan vote, even as anomalous as the results were. There only seemed to be two plausible options: first, the campaign could ask a judge to reapportion the overvotes according to the same distributions of votes that had been recorded in other Florida counties; and second, the campaign could request a new election.¹⁴⁵ Neither of these options seemed very plausible, as it was highly unlikely that judges would agree to assign Gore votes that he legally did not receive when it would change the results of an election, and a new election contradicted federal law that required uniform dates for presidential elections and would certainly be influenced by the present knowledge of the national outcome.¹⁴⁶ Thus, the Gore campaign decided not to initially pursue any legal action in Palm Beach County.

“Vote for Gore and Brown!”: An another unfortunate anomaly for Gore occurred in Duval County (Jacksonville), where many African American voters lived. The Get Out the Vote Drive in Duval County had spectacular success as black voters turned out in record numbers to vote for Gore and Corrine Brown, a black Democratic Congresswoman.¹⁴⁷ The phrase for the joint campaign was, “Vote for Gore and Brown.” So thousands of voters in predominantly black precincts voted for Gore on the first page of their ballots, then turned to the next page to vote for Browne – Harry Browne, the Libertarian candidate for president.¹⁴⁸ The sample ballot sent out to voters for the election had instructed voters to “vote on all pages,” so voter confusion was certainly

¹⁴⁴ Ibid.

¹⁴⁵ Dover 2001, 40-41.

¹⁴⁶ Ibid.

¹⁴⁷ Sabato 2002, 9.

¹⁴⁸ Ibid.

possible.¹⁴⁹ Around 26,000 votes were invalidated in Duval County as overvotes, around four times as many as in 1996.¹⁵⁰

Further Anomalies: Other more minor anomalies occurred in Florida on Election Day as well. The Volusia County election results were delayed several hours because of a computer disk error that subtracted 16,000 votes from Gore and added hundreds to Bush in one precinct.¹⁵¹ In several counties, dozens of registered voters complained that they were denied the right to vote because their names did not appear on voter logs. In Pinellas County, a second recount had to be conducted after the first recount showed an increase of more than 400 votes for Gore – it turned out that some votes had been “overlooked” on election night and hadn’t been counted the first time.¹⁵²

The Gore Strategy: The statewide machine recount of the ballots was completed on November 10, and Bush’s lead had shrunk to just 327 votes. The remarkable narrowness of the vote and the fact that totals could change after a recount were psychological shocks that made Bush’s claim to victory appear even shakier.¹⁵³ The Gore team wanted to avoid litigation, and decided to pursue the route of manual recounts that would hopefully find enough legally cast votes to overcome Bush’s lead.¹⁵⁴

Of over six million votes cast on November 7, 2000, around 174,000 of these votes were not counted, because they were either overvotes or undervotes. The overvotes numbered about 110,000, while the undervotes numbered around 64,000. The Gore campaign had to use the presence of anomalies in traditional Democratic counties to its advantage and press the question as to whether Bush really won Florida. In complement to this, the campaign stressed that Al Gore had won the national popular vote by over a half million, which increased Gore’s symbolic legitimacy and provided him the patience of the American people while recounts were administered. The Gore team then pursued the strategy of examining the undervotes of four selected highly Democratic counties (Volusia, Broward, Miami-Dade, and Palm Beach) via a hand

¹⁴⁹ Dionne and Krystal 2001, 232.

¹⁵⁰ *New York Times* Correspondents 17 November 2000, 92.

¹⁵¹ *New York Times* Correspondents 10 November 2000, 19.

¹⁵² *New York Times* Correspondents 10 November 2000, 20.

¹⁵³ Ceaser and Busch 2001, 181.

¹⁵⁴ Gillman 2001, 27.

recount, which was allowed under Florida state law.¹⁵⁵ The hand recount would also identify votes that the voter had written in Vice President Gore or Governor Bush rather than using the appropriate punch hole. It seemed like a workable strategy at the time because it was perceived as legit and normal by most Americans, and it would not force Gore to concede.¹⁵⁶ It also proposed to count more ballots rather than less, which would ultimately be the Gore team's recount theme.

A theme that should have been pressed more by the Gore campaign but was not until it was almost too late was the fact that ballot spoilage occurred at its highest rates in African American regions. For example, almost one third of ballots in black sections of Republican Duval County were invalidated, a rate of four times as many as in the white precincts of the same county.¹⁵⁷ These black sections, of course, corresponded with the poor section of town, where literacy rates were lower and voter confusion more likely. Gasden County, a largely poor black and rural area, had an astronomical 12% spoilage rate because of a confusing ballot with presidential candidates listed in two columns – and most of the spoilage was due to overvotes.¹⁵⁸ Furthermore, black voters were more likely to encounter voting equipment that was prone to not registering a legally cast vote: in the richer, and correspondingly whiter, counties of Florida, optical scanning voting machines were used (with a failure rate of less than a percent), while a full four percent of the cheaper punch card systems were likely fail to register a vote for president.¹⁵⁹ Since the National Association of the Advancement of Colored People (NAACP) had had enormous success with its get out the vote effort in Florida, the ballot spoilage rate among African Americans in Florida was certainly disappointing. A Republican strategist commented, “The NAACP did a tremendous job of turnout in Florida. But in a way they overachieved, and got people out who couldn’t follow instructions.”¹⁶⁰

The problem with recounting the undervotes associated with these four counties was soon to become a household term: “chads,” or the paper covering the perforations.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Dionne and Krystal 2001, 230.

¹⁵⁸ Dionne and Krystal 2001, 234.

¹⁵⁹ Dionne and Krystal 2001, 233.

¹⁶⁰ Dionne and Krystal 2001, 232.

Three out of the four counties (all except Volusia) used punch card ballots, and sometimes the chads did not fully detach after being poked by a stylus. The challenge would soon become to discern voter intent from these chads, and if the chads were not fully detached constituted a vote.

Vice President Gore had to be cautious with his strategy in the post-election days from the very moment he took back his concession, for it was he who had the burden of proof. This sort of situation had never occurred before in modern times, and he had to think of the long-term implications of his actions in the early days. His strategy was sure to be more aggressive than Governor Bush's, who had the presumptive title of president-elect. However, the situation was even more dire for Gore because if he lost this election, he had no official position; whereas if Bush lost, he still remained governor of Texas.¹⁶¹

The Bush Strategy: The result of the automatic machine recount was interpreted differently by the Bush team. The Gore side contended that the results of the automatic recount indicated flaws in the voting equipment and hence that machines were unreliable.¹⁶² The Bush side, on the other hand, determined that the result of the recount was not the work of machines alone. Moreover, unlike the Gore side, there was no evidence that Bush voters had any difficulty voting for their candidate.¹⁶³ The Bush strategy, then, in the words of Bush lawyer Ben Ginsberg, was "to validate the results of the election and fight all further searches for votes."¹⁶⁴ This meant going to court, even though the Bush team admitted its reluctance in involving the courts. So, on November 10, the Bush team brought its suit to federal court asking for an injunction to "stop the hand counts on equal protection grounds that there were no standards for conducting recounts and that it constituted an unlawful depreciation of the votes in some counties if only votes in selected counties were counted."¹⁶⁵ James Baker, former chief of staff and Bush counsel, commented, "It is precisely for these reasons that over the years our democracy has moved increasingly from hand counting of votes to machine counting.

¹⁶¹ Ceaser and Busch 2001, 73.

¹⁶² Ceaser and Busch 2001, 182.

¹⁶³ Gillman 2001, 28.

¹⁶⁴ Ibid.

¹⁶⁵ Ceaser and Busch 2001, 182.

Machines are neither Republicans nor Democrats, and therefore can be neither consciously nor unconsciously biased.”¹⁶⁶

The choice to take the case to federal court instead of state court was no oversight – it was clearly a strategic decision to take the controversial case out of Florida and therefore out of the hands of locally elected judges as quickly as possible.¹⁶⁷ Furthermore, federal courts are generally more unwilling than state courts to reverse election results.¹⁶⁸ The Republicans also probably noted that the U.S. Supreme Court, with mostly Republican appointees, would probably be more sympathetic to its cause than the Florida Supreme Court, with mostly Democratic appointees.

The Month-long Battle Over Chads

The Democrats were delighted to have forced the Republicans into filing the first lawsuit. Gore campaign lawyer Warren Christopher commented, “If Governor Bush truly believes that he has won the election in Florida, he should not have any reason to doubt or fear to have the machine count checked by a hand count.”¹⁶⁹ On Monday, November 13, 2000, the Democrats received their first victory when Judge Middlebrooks ruled against the Bush request to halt the recounts, and explained that in the Constitution, “the responsibility for the selection of electors for the office of President rests primarily with the people of Florida, its election officials, and if necessary, its courts.”¹⁷⁰ The Bush team appealed this ruling to the Eleventh Circuit in Atlanta two days later.

Meanwhile, all four counties had formally agreed to the Gore team’s request for hand recounts, and thus began the haggling over chads. In the following weeks, much of the dispute over the hand count would be centered on these tiny bits of paper and whether they were detached enough to be considered a legal vote. Florida state law had no statutory provisions to determine what constituted a legal vote, and instead ambiguously referred to “voter intent.” Chads might be hanging on to the ballot by one,

¹⁶⁶ *New York Times* Correspondents 11 November 2000, 40.

¹⁶⁷ *New York Times* Correspondents 11 November 2000, 42.

¹⁶⁸ *Ibid.*

¹⁶⁹ *New York Times* Correspondents 11 November 200, 40-41.

¹⁷⁰ Gillman 2001, 38-39.

two, or even four corners. A “hanging” chad was attached to the ballot by two or fewer corners, and a “pregnant” or “dimpled” chad was attached by all four corners but had signs that it had been punched with the stylus.¹⁷¹ Since there was no method indicated in state law, the counties were allowed to choose their own standard of counting the votes. In Volusia County, the canvassing board began its hand count by administering “the sunshine test,” which determined a vote had been cast if light gleamed through the hole.¹⁷² This test was soon abandoned for the more strict “three-corner rule,” which would count a vote only if the chad was “hanging.”¹⁷³ Palm Beach County likewise only recorded hanging chads, while Broward County counted both hanging and dimpled.

The canvassing boards of all four counties were largely Democrats, and it could be argued that they would be more favorable to Gore. However, observers from both sides watched as the votes were counted and voiced their objections when they did not agree. Considering this, the Bush team had a noticeable advantage since it could easily stall recount efforts in a nation whose laws give deadlines great importance. It is hard for anyone to disagree that the Bush team did not deliberately stall the recounts, as many journalists observing the procedure reported Republican challenges to votes they considered to be clearly punched.¹⁷⁴ In other cases, Republicans just failed to provide enough counters to assemble the counting teams. On the other hand, Republicans did have a legitimate complaint when they argued that the more the ballots were handled, the more likely that the chad would detach. Some even went as far as to accuse the Democrats of handling the ballots roughly so the chads would detach, and one Republican observer even accused a Democratic observer of eating the chads.¹⁷⁵

The Battle Against Katherine Harris

On Monday, November 13, Florida Secretary of State and co-chair of the Bush campaign election team of Florida Katherine Harris announced that she would enforce a November 14 legal deadline for certifying the statewide vote, and would certify the

¹⁷¹ Dover 2003, 20.

¹⁷² Gillman 2001, 37.

¹⁷³ Ibid.

¹⁷⁴ Gillman 2001, 53.

¹⁷⁵ *New York Times* Correspondents 19 November 2000, 104-105.

election results on November 18 when the overseas ballots had been added in. She also stated that she had no intention of accepting the recount totals, for in her opinion the recounts only should have been undertaken if evidence showing the failure of the performance of the machines in the machine recount.¹⁷⁶ This was immediately attacked by the Gore team as “[A] plan...to produce a particular result in the election rather than to ensure that the voice of all the citizens of the state should be heard.”¹⁷⁷ Moreover, Gore supporters pointed out that late election results “may be ignored” by the secretary, which indicated that they did not have to be ignored. Only one county, Volusia, looked able to complete its count by the deadline; Palm Beach and Broward were in the process and Miami-Dade had not even begun. To their joy, the Florida Supreme Court, acting on its own initiative, issued an injunction ordering the secretary of state not to proceed with the certification and ordered the hand counting to continue.

Meanwhile, on November 15, Vice President Gore shocked the Bush team by asking for a statewide hand recount and pledging to end an end to all legal challenges when the count was complete. This was a risky move for him, because Bush could potentially pick up extra votes from Republican strongholds. Nevertheless, it went along beautifully with his “count every vote” strategy and created the perception that he wanted to be fair and would generously give up his protest if the recounts proved he had not won. Bush appeared three hours later and politely rejected Gore’s offer, stating that the manual vote counting in Florida was not subject to a uniform standard.

The Overseas Ballot Debacle: The count of the overseas ballots occurred on November 18, and by law was supposed to be the last event before final certification.¹⁷⁸ These ballots consisted of two main groups: military voters and Floridian civilians living abroad, mainly U.S. diplomats. The balloting went nearly two to one for George W. Bush (1,380 to 750) and increased his lead to 930 votes. Like the counting of the punch-card ballots, counties applied vastly different standards to counting these ballots. Katherine Harris had instructed counties to accept otherwise-valid ballots from overseas that were postmarked after Election Day, but some counties openly defied these

¹⁷⁶ Ceaser and Busch 2001, 184.

¹⁷⁷ *New York Times* Correspondents 14 November 2000, 60.

¹⁷⁸ Ceaser and Busch 2001, 185.

instructions insisting that Harris had misinterpreted the law.¹⁷⁹ State law requires that overseas votes be postmarked. Her instructions were seen as a partisan move to maximize the overseas votes, which were expected to favor Bush. Canvassing boards in Democratic counties threw out ballots at a far higher rate than those in Republican counties, perhaps in part because Republican-dominated counties accepted ballots postmarked after the election or with no postmarks, while Democratic counties rejected them.¹⁸⁰ In an interesting paradox, Republicans, who had previously been arguing strict legal procedures now argued for intent, while Democrats, who had previously been arguing for intent, now argued for strict legal procedures.¹⁸¹ Moreover, the Republicans urged leeway for the military ballots on a moral high ground, since they were overseas fighting for their country. The civilian ballots, mostly Gore votes, were clearly identifiable with respect to the military ballots, but the same Republicans who urged leeway with the military ballots urged the opposite for these ballots.

The Bush team knew the exclusion of so many military votes was political dynamite.¹⁸² They accused the Gore team of trying to prevent the servicemen from voting. Since the Gore campaign had been arguing from the beginning that all the votes should be counted, there was little it could do without appearing hypocritical.¹⁸³ Some on the Gore side mused why the vote of a soldier was worth more than that of an inner-city voter, but they did not press the issue.¹⁸⁴ The Gore team was clearly defeated on this issue when Vice President candidate Joseph Lieberman requested Florida election officials to reconsider their rejection of the military ballots, even if they didn't comply with the law.¹⁸⁵

A New Lawsuit in Seminole County: A new lawsuit popped up shortly after a *New York Times* reporter revealed that Republicans had corrected thousands of absentee ballots in Seminole County, a suburban county north of Orlando. Sandra Goard, the Republican election official, had allowed party workers to correct thousands of applications in her own office for absentee ballots that had missing voter identification

¹⁷⁹ *New York Times* Correspondents 18 November 2000, 96.

¹⁸⁰ *New York Times* Correspondents 18 November 2000, 97.

¹⁸¹ Ceaser and Busch 2001, 186.

¹⁸² Gillman 2001, 52.

¹⁸³ Dover 2003, 45.

¹⁸⁴ Ceaser and Busch 2001, 186.

¹⁸⁵ *New York Times* Correspondents 20 November 2000, 111.

numbers.¹⁸⁶ The effect of her actions was to provide at least 4,700 absentee ballots to Republican voters whose applications should have been rejected (since the voter identification was missing). Democrats claimed that this was a violation of Florida laws on the handling of absentee ballots. Moreover, Miss Goard had allowed the Republican Party workers to separate their applications from the Democratic absentee applications with the same problem, and these applications were thrown out without allowing the Democrats the same opportunity to make them comply with state law.¹⁸⁷ A local Democratic lawyer, Harry Jacobs, filed suit seeking to identify the votes that had been cast through the modified ballot applications.¹⁸⁸ He did not think they would be recovered, however, so he would likely seek to have every absentee ballot in the county thrown out – which would have swung the election to Gore if successful.

The Florida Supreme Court's First Decision: On Monday, November 20, the Gore and Bush teams assembled to argue *Palm Beach v. Harris* to the Florida Supreme Court. The case was really three cases, with appeals from Volusia County Canvassing Board and the Florida Democratic Party as appellants under the blanket name of the petitioner, Palm Beach County Canvassing Board. The Gore team argued to allow the hand count to continue and for the court to set new feasible deadlines, and the Bush team argued that this action would in effect replace the executive branch with the judicial branch and violate separation of powers.¹⁸⁹ The Florida Supreme Court issued its unanimous decision the next morning, which stated:

“Because of the unique circumstances and extraordinary importance of the present case, wherein the Florida Attorney General and the Florida Secretary of State have issued conflicting advisory opinions concerning the propriety of conducting the manual recounts, we conclude we must invoke the equitable powers of this Court to fashion a remedy that will allow a fair and expeditious resolution of the questions presented here.”¹⁹⁰

¹⁸⁶ *New York Times* Correspondents 13 November 2000, 54-55.

¹⁸⁷ Gillman 2001, 79.

¹⁸⁸ *New York Times* Correspondents 13 November 2000, 55.

¹⁸⁹ Busch and Ceaser 2001, 186-187.

¹⁹⁰ Dionne and Krystal 2001, 46.

The decision set a new deadline on Sunday, November 26, at 5 pm, and directed that the hand counts would continue and would be included in the final totals.¹⁹¹ Bush lawyers announced that they would appeal the decision to the U.S. Supreme Court.

A Return to Palm Beach and Seminole: At the same time as the Florida Supreme Court hearing against Katherine Harris, progress was made on both the Butterfly Ballot case of Palm Beach County and the absentee ballot case of Seminole County. In the former, Judge Jorge Labarga ruled that he did not have the authority to order a county-wide revote. In his ruling, he recognized that there were times when the laws of Florida and other times had been construed to allow for this extraordinary remedy, but none had ever involved presidential elections.¹⁹² In Seminole County, which had allowed Republican Party workers to correct thousands of absentee ballots, Judge Debra Nelson rejected Republican efforts to throw out the lawsuit and scheduled a hearing.

Martin County: Ironically, Seminole County was not the only county that had allowed Republican Party workers to correct absentee ballots, for the same problem was discovered in Martin County. Martin County, located in a rural region of Florida between Orlando and Miami, went for Bush 56% to 44%. Problems arose, however, when it was discovered that the Martin County supervisor of elections, a Republican, had allowed Republican Party workers to take away the absentee ballot requests to add voter identification numbers and resubmit them.¹⁹³ Like the case in Seminole County, the elections office had allowed other incomplete applications submitted by independents and Democrats to stack up without correction and without providing the same opportunity to the Democrats. The Democrats filed a lawsuit on December 2, *Taylor v. Martin County Canvassing Board* that would be a net gain of 2,815 votes for Gore if successful.¹⁹⁴

Nassau County: Nassau County, safely in Bush territory in the far northeastern corner of the state, suddenly became part of the Florida controversy when its automatic recount of more than 23,000 votes produced 218 votes fewer than the first count,

¹⁹¹ Ceaser and Busch 2001, 187.

¹⁹² Gillman 2001, 63.

¹⁹³ *New York Times* Correspondents 29 November 2000, 188.

¹⁹⁴ Gillman 2001, 93.

subtracting 51 total votes from Bush.¹⁹⁵ The canvassing board had initially certified the recount, but rescinded that certification and reverted to the original the Friday before Harris's official certification. Katherine Harris accepted this recertification, and appropriately added the 51 votes back into Bush's totals on Sunday night. The Democrats were upset at what they deemed another partisan move by Harris, and Gore lawyer David Boies planned to include Nassau County in the lawsuit to contest the election results.

Miami-Dade Throws in the Towel: On Wednesday, November 22, Miami-Dade County canvassing board decided to cease the recounts of that county because they would not be able to finish counting the county's 700,000 ballots by Sunday evening.¹⁹⁶ Initially, they had decided to only count the approximately 10,000 undervotes, but Republican observers demonstrated chaotically in the building when this decision was announced. This meant that the 157 votes Gore had gained thus far in the Miami-Dade recount were invalidated again along with the other potential hidden votes among the undervotes. The Gore team filed suit to compel the canvassing board to continue the recount, but the Florida Supreme Court refused unanimously.

The U.S. Supreme Court Steps In: In a surprising move, the United States Supreme Court agreed to hear the case that the Bush team had appealed, now renamed *Bush v. Palm Beach Canvassing Board*. The Bush team's basic argument was that the Florida Supreme Court had established new rules (and therefore changed the law) when it interpreted the state's election law to require that late-filed returns be counted rather than ignored, as one section of state law specified.¹⁹⁷ The Gore team's response was that by reading the state election law to provide the flexibility necessary to determine the will of the voters, the state court was interpreting the law as it had always been.¹⁹⁸

The initial response to the Court's decision was surprise that the justices would intervene in a matter that had traditionally been under the jurisdiction of state law; especially the five conservative justices who had a track record of promoting federalism.

¹⁹⁵ *New York Times* Correspondents 27 November 2000, 173.

¹⁹⁶ *New York Times* Correspondents 23 November 2000, 134.

¹⁹⁷ *New York Times* Correspondents 25 November 2000, 150.

¹⁹⁸ *New York Times* Correspondents 25 November 2000, 151.

An observer commented that “a decision split along the court’s usual ideological fault line could be questioned [as] partisan...perhaps damaging the court’s credibility and doing little to calm the political tempest.”¹⁹⁹ Conservative legal scholars believed that the Court would not have even taken the case unless it planned on reversing the Florida Supreme Court, even at the risk of being labeled partisan.²⁰⁰

The Certification: On Sunday, November 26, Secretary of State Katherine Harris performed the final certification of the Florida statewide vote. Unfortunately for the Gore team, Palm Beach County could not make the deadline and Harris refused to give them until the next morning to finish. They finished at 7 pm Sunday night with a net gain of 192 votes for Gore, a half hour before Harris was to announce the certification. Thus, the figures from the machine recount from Palm Beach County and Miami-Dade Counties were used since she interpreted state law as requiring a full recount. Gore had gained 567 votes in Broward County, which had finished its counting on Saturday night. She certified George W. Bush as the winner of Florida by a margin of 537 votes. After the certification, Gore’s running-mate Senator Lieberman appeared on television from Washington to condemn “what by any reasonable standard is an incomplete and inaccurate count.”²⁰¹ Clearly, Gore was not going to concede yet.

Gore Contests the Election

The following day, on Monday, November 27, Al Gore formally contested the election by filing a lawsuit in Florida state circuit court. His lawsuit stated that the vote totals certified the previous day by the Florida Secretary of State were wrong, and that thousands of votes in Nassau, Miami-Dade, and Palm Beach Counties remained uncounted.²⁰² Had these votes been counted into the certified totals, Vice President Gore would have won. The Republicans moved to dismiss the suit, citing the following reasons: 1) Gore could not contest the results because technically he was not a candidate in the election, only his electors were; 2) Manually counting only part of the ballots is illegal; 3) Some “dimpled” ballots, especially in Broward county, were counted

¹⁹⁹ Gillman 2001, 76.

²⁰⁰ Ibid.

²⁰¹ *New York Times* Correspondents 20 November 2000, 165.

²⁰² *New York Times* Correspondents 28 November 2000, 176.

as votes; and 4) Gore's lawsuit was filed past the legal deadline.²⁰³ The Republicans were planning to call ninety-five witnesses at the trial, which Democrats accused to be a stalling technique. The case was to be heard by Judge N. Sanders Sauls, a Republican, and it was to begin on December 2 despite Gore pleas for an earlier date.

Republicans struck back the next day when a special committee of the Florida legislature met to call for a special legislative session that would appoint its own slate of Florida electors if the disputes were not resolved by December 12.²⁰⁴ In the hearing, Republican legal experts cited the Electoral Count Act of 1887 that said "the legislature must appoint electors if the results are in doubt, either because of an unresolved contest or because the results were produced by counting procedures that were altered after Election Day."²⁰⁵ The committee voted for the special legislative session, along partisan lines. Meanwhile, President Bill Clinton denied the Bush team the \$5.3 million federal transition fund until the presidential race was resolved.

The U.S. Supreme Court Hearing: On December 1, 2000 the Bush and Gore "dream teams" of lawyers argued before the United States Supreme Court in *Bush v. Palm Beach County Canvassing Board*. This hearing was in regards to the appeal filed by the Bush team after the Florida Supreme Court ruled in favor of the Gore team by allowing the recount results to be included in final certification and by extending the deadline. The Bush argument was that the Florida court changed the rules, and the Gore argument was that the decision was an "ordinary exercise in statutory interpretation."²⁰⁶ These arguments were subjected to intense questioning by the nine Supreme Court justices, of which many observers claimed a noticeable bias for a particular side for each justice based on their respective questioning (with the exception of Clarence Thomas, who routinely does not ask questions). These observers maintained the usual ideological split of the justices in reference to this case, meaning the reliable conservatives (Rehnquist, Scalia, Kennedy, O'Connor, and Thomas) tending to side with the Bush lawyers while the moderates/liberals (Ginsburg, Stevens, Souter, and Breyer) tending to side with the Gore lawyers. There was some doubt

²⁰³ *New York Times* Correspondents 1 December 2000, 198-199.

²⁰⁴ Gillman 2001, 80.

²⁰⁵ *New York Times* Correspondents 29 November 2000, 186.

²⁰⁶ Gillman 2001, 82.

about Justices O'Connor and Kennedy, and many thought that these two justices would be the deciding factors.

The justices delivered their opinion the following Monday, a per curiam (unanimous) decision that stated:

“After reviewing the opinion of the Florida Supreme Court, we find ‘that there is considerable uncertainty as to the precise grounds for the decision.’ ...Specifically, we are unclear as to the extent to which the Florida Supreme Court saw the Florida Constitution as circumscribing the legislature’s authority...The judgment of the Supreme Court of Florida is therefore vacated, and the case is remanded for further proceedings not inconsistent with this opinion.”²⁰⁷

This meant that the U.S. Supreme Court wanted the Florida Supreme Court to clarify the basis for its decision, and that for the moment the existing decision was not operative.²⁰⁸ Many thought that the decision was in fact not unanimous among the justices – that instead the Court was trying to prevent criticism that would inevitably befall it if it had ruled along the usual ideological split.²⁰⁹ Moreover, a common interpretation of the decision was that of a slap on the wrist to the Florida Supreme Court by the U.S. Supreme Court – signaling that the U.S. Supreme Court was watching the Florida Supreme Court and would not hesitate to intervene.²¹⁰

The Butterfly Dies: The same day as the U.S. Supreme Court oral arguments, the Gore team suffered a defeat in the infamous butterfly ballot case. On appeal to the Florida Supreme Court, the justices had unanimously ruled against overturning Judge Labarga’s decision, noting:

“A court should not void an election for ballot form defects unless such defects cause the ballot to be in substantial noncompliance with the statutory election requirements...[and that] such defects operate to prevent [a] free, fair and open choice...We conclude as a matter of law that the Palm Beach County ballot does not constitute substantial noncompliance with statutory requirements...”²¹¹

²⁰⁷ Dionne and Krystal 2001, 52.

²⁰⁸ Ceaser and Busch 2001, 193.

²⁰⁹ Gillman 2001, 95.

²¹⁰ Brace and Langer 2001, 647,

²¹¹ Gillman 2001, 93.

The Contested Election Trial Begins: The lawsuit to officially contest the election, known as Gore v. Harris in Leon County Circuit Court, began the same day as the U.S. Supreme Court's oral hearing (December 2) with presiding Judge N. Sanders Sauls. Gore's lawyer David Boies argued that the 9,000 unexamined Miami-Dade undervotes included uncounted legal votes and that a hand count of these ballots would be able to determine voter intent from a good portion of these ballots.²¹² Boies also argued that the Nassau County decision to certify the original count rather than the automatic recount was contrary to statutory requirements, and that fifty-one votes should be added for Gore.²¹³ Furthermore, the 192 recovered votes from Palm Beach County along with the 51 votes from Nassau County should be immediately readjusted in Gore's official totals. Finally Boies asked for a judicial review of 3,800 disputed Palm Beach ballots. Bush lawyer Barry Richard replied to these arguments that canvassing boards were given authority under state law to make decisions about recounts, and that their decisions held unless there was evidence to show they had abused their authority, which there clearly wasn't in the Miami-Dade and Palm Beach cases. In a ruling on Monday, December 4, Sauls rejected Gore's arguments entirely, writing:

"There is no credible statistical evidence and no other competent substantial evidence to establish by a preponderance a reasonable probability that the results of the statewide election in the State of Florida would be different from the result which has been certified by the State Elections Canvassing Commission."²¹⁴

It was a devastating decision for the Gore team, one that former Clinton Chief of Staff called the beginning of the "Hail Mary" phase of this election.²¹⁵ Gore lawyers announced they would appeal the decision to the Florida Supreme Court. The Florida Supreme Court agreed to hear the case on Thursday, December 7.

Florida Legislature Steps In: The Florida State Legislature on December 6 announced that they would appoint a set of presidential electors who would support Governor George W. Bush if the Florida Supreme Court reverses Bush's victory in the

²¹² Gillman 2001, 99.

²¹³ Ibid.

²¹⁴ Dionne and Kristol 2001, 55.

²¹⁵ Gillman 2001, 101.

state.²¹⁶ The state Democratic lawmakers, who could not block the move, tarred this action as a partisan effort devised by Jeb Bush for his brother. The Republican lawmakers insisted that they only wanted to make sure the voters of Florida were not disenfranchised.²¹⁷ Many saw the state legislature's action as a warning shot from the legislative to the judicial branch.

Lewis and Clark Expedition In an ironic coincidence, the Seminole and Martin absentee ballot cases were to be heard on the same day (December 8) by Judges Nikki Clark and Terry Lewis respectively. The lawsuits, which were not officially associated with the Gore campaign (this would go against Gore's "count every vote" strategy), sought to discount the all the absentee ballots of Seminole and Martin Counties because Republican workers had been allowed to fix voter applications which otherwise would have been thrown out. An alternative method offered by the plaintiffs was to throw out ballots according to a statistical formula. Republican lawyers argued that the act of altering ballot applications was not enough to alter the outcome of the election.²¹⁸ Victory for either plaintiff would effectively overturn the election since Bush had heavily carried both counties.

The Gore side knew these two lawsuits were long shots, and indeed they were. Despite the fact that both cases were ruled upon by Democratic judges, both had the same outcome that was not favorable to Gore. They ruled that while the election supervisors certainly had violated the Florida statutes, their actions were not egregious enough to necessitate the nullification of all absentee ballots in the two counties.²¹⁹ Nor were they going to substitute a statistical formula to alter the totals. The plaintiffs promised to appeal.

It is necessary to point out that by the time of the Lewis and Clark rulings, a full month and a day had passed since Election Day. The American public was getting tired of recounts and lawsuits, despite strong signs of initial public patience to find out the true winner. George W. Bush's legitimacy had surely begun to sink in, for not once in the past month had he been behind in the official totals. Moreover, he had mostly kept

²¹⁶ *New York Times* Correspondents 7 December 2000, 250.

²¹⁷ *Ibid.*

²¹⁸ *New York Times* Correspondents 7 December 2000, 254.

²¹⁹ Gillman 2001, 110.

himself in the shadow of the post-election controversy, stepping out only after he had been certified the winner of Florida. Gore had also kept himself out of the spotlight especially at the beginning of the controversy, but the persistent efforts of his campaign to lengthen the election projected the image of a “Sore Loserman” onto the candidate himself. Whether the election was ultimately fair or unfair, the American people were just getting tired of hearing about it.

Florida Supreme Court, Round 2: The Gore team and lawyer David Boies argued before the Florida Supreme Court once again on Thursday, December 7th on the appeal of Judge Sauls’s decision (Gore v. Harris). The arguments were largely the same as the case against Judge Sauls, but Boies had to answer pointed and tough questions from five Florida justices. The justices mused about whether the court had a proper role in this appeal and if it could legitimately overrule Sauls who had decisively ruled against Gore.²²⁰

Nevertheless, the Florida Supreme Court ruled for Gore in an astounding 4 to 3 decision. The court stated that Judge Sauls had utilized an exceptionally high standard in his decision that Gore had not proved the disputed ballots should be counted.²²¹ The major premise of their ruling was from the Florida contest statute, which required judges to correct any problems that might be caused when a certified election result fails to include an adequate number of legal votes casts doubt on the certified result’s accuracy.²²² The ruling ordered recounts to begin in every county in the state, not just the counties selected by Gore. In addition, the Court ordered Bush’s official 537 vote lead trimmed to just 154, which included the full Palm Beach recount and the partial Miami-Dade recount.²²³ The ruling did not address the 51 votes from Nassau County, and it also did not offer a standard for vote counting other than “intent of the voter.” The Court ordered that whichever candidate won the statewide recount would be awarded Florida’s electoral votes. The majority ruling contained language that was deliberate, careful, and anticipatory of the equal protections argument, indicating acknowledgment of the Supreme Court’s earlier “warning.” The Court also refused to define a standard

²²⁰ *New York Times* Correspondents 8 December 2000, 257.

²²¹ *New York Times* Correspondents 9 December 2000, 266.

²²² Gillman 2001, 115.

²²³ Gillman 2001, 114.

for manually recounting the votes so that the Bush team could not accuse it of creating new law.

The ruling was clearly controversial within the Florida Supreme Court since the decision was 4-3, whereas it usually issues unanimous opinions. Furthermore, Chief Justice Wells dissenting opinion was particularly heated:

“I have a deep and abiding concern that the prolonging of judicial process in this counting contest propels this country and this state into an unnecessary constitutional crisis. I have to conclude that there is a real and present likelihood that this constitutional crisis will do substantial damage to our country, our state, and to this court as an institution.”²²⁴

This ruling could not be labeled as partisan because the division among the justices was not along traditional ideological lines. Justice Shaw, who was considered the most liberal member of the court, was a dissenter, while Justice Quince, who was a Jeb Bush appointee, voted with the majority.

The reaction of the nation was utter shock – some outrage and some joy, but above all, shock. Conservative pundits were in arms; House Majority Whip declared, “This judicial aggression will not stand.”²²⁵ Commentators who had interpreted the U.S. Supreme Court’s earlier decision as a warning signal to the Florida Supreme Court were in awe of the Florida Court’s audacity. Moreover, these commentators believed that the U.S. Supreme Court was now in a compromising position – it either needed to shut down the recount now, or undo the public results if Gore took the lead over the weekend.²²⁶

The case was then remanded back to Judge Sauls, who recused himself; so Judge Lewis was selected to set a process for the manual recount. Lewis too refused to provide a standard for the recounts other than “voter intent.” Florida counties with all Republican canvassing boards were noticeably distressed, claiming that on most undervotes they could not discern the intent of the voter. Some counties did not even have the undervotes separated. The Bush team requested an emergency injunction to

²²⁴ Dionne and Krystal 2001, 82.

²²⁵ Gillman 2001, 117.

²²⁶ Gillman 2001, 118.

halt the recounts, but the Eleventh Circuit Court of Appeals denied the request. As Justice Wells had ominously forewarned, the state was in chaos.

Bush v. Gore

The chaos did not last long. On Saturday, December 9, the United States Supreme Court issued an emergency injunction ordering a halt to the hand recounts by a narrow margin of 5 to 4. The justices agreed to hear the case on Monday, December 11 – only one day earlier before the deadline that had been recognized all along by both sides to certify the electors, December 12. The Bush side had petitioned the injunction, citing the now all-too-familiar argument that hand recounts were arbitrary and discriminatory; moreover, the Bush team had to demonstrate that its candidate would be “irreparably harmed” if the recounts were to proceed while the case was reexamined.²²⁷

The emergency injunction looked like the end for Al Gore, even before the case was heard by the Supreme Court. The 5 to 4 decision to issue the injunction stank of partisan motive to Gore supporters, as the five conservative justices sided against the four moderate/liberals. Senator Bob Kerrey of Nebraska, a Democrat, pointed out that “[The Rehnquist court] has established in case after case the principle of state sovereignty. It’s going to put them at odds with their own conclusions in the big Federalism case that’s going on.”²²⁸ Additionally, even if the recount was upheld, it was likely that there would not be enough time to complete it.

Justice John Paul Stevens wrote the dissenting opinion, which focused on three principles that he believed the order had violated: first, respect for rulings by state courts on questions of state law; second, the careful exercise of the U.S. Supreme Court’s jurisdiction on matters that concern other branches of government; and third, he did not believe that George W. Bush’s claim did not constitute irreparable harm.²²⁹ He wrote:

“Counting every legally cast vote cannot constitute irreparable harm. On the other hand, there is a danger that a stay may cause irreparable harm to the respondents – and more importantly, the public at large – because of the risk

²²⁷ Gillman 2001, 124.

²²⁸ *New York Times* Correspondents 10 December 2000, 282.

²²⁹ *New York Times* Correspondents 10 December 2000, 277.

that ‘the entry of the stay would be tantamount to a decision on the merits in favor of the applicants.’ Preventing the recount from being completed will inevitably cast a cloud on the legitimacy of the election.”²³⁰

In a rare move, Justice Scalia felt obliged to write a public explanation of the majority opinion. In his explanation, he focused upon the claim of irreparable harm:

“On the question of irreparable harm...a few words are appropriate...One of the principal issues in the appeal we have accepted is precisely whether that votes have been ordered to be counted are, under reasonable interpretation of Florida law, ‘legally cast votes.’ The counting of votes that are of questionable legality does in my view threaten irreparable harm to petitioner, and to the country, by casting a cloud upon what he claims to be the legitimacy of his election.”²³¹

Effectively, Scalia was stating that if the recounts proceeded and appeared to make Gore the winner by the time the court could decide on the Bush appeal, the Bush position would be unsound as a political matter even if it prevailed as a matter of law.²³²

The tables had turned once again, and the reaction was predictable: outrage from the Gore supporters, jubilation from the Bush supporters, and a collective eye roll by the American public. Gore lawyer David Boies accused Scalia of “[not wanting] to have the legitimacy of [a potential Bush] presidency undercut by the fact that people will know there were more votes for Vice President Gore.”²³³ Liberal commentators portrayed the Court’s conservatives as being “hellbent on putting Bush in the White House.”²³⁴ Conservatives praised the decision, indicating their support of judicial regulation of the “activist” Florida Supreme Court.

The hearing was to begin at 11 am on December 11th. Bush was represented by Theodore Olsen, and Gore by David Boies. Each was questioned separately by the entire nine-member Supreme Court, with the focus on what should count as a legal vote in Florida, the Florida Supreme Court creating “new law” with its decision, and the Bush equal protection argument. Observers of the hearing commented that the questions

²³⁰ Dionne and Krystal 2001, 98.

²³¹ Dionne and Krystal 2001, 97.

²³² *New York Times* Correspondents 11 December 2000, 291.

²³³ Gillman 2001, 126.

²³⁴ *Ibid.*

asked by the justices revealed a resolute immobility from their previous positions. For example, the “liberal bloc” tended to pry Boies on how the vote-counting would proceed, whereas the “conservative bloc” did not seem at all interested in this topic. Bush supporters had indicated some nervousness about Justice Kennedy, who was the somewhat unreliable fifth member of the conservative bloc, but Kennedy showed few signs of reversing his position at the hearing.

The decision was handed down by the Court the following day. In a 5 to 4 opinion split down the same line as the injunction order, the Court reversed the Florida Supreme Court and ordered the recounts to end. They concluded that the Florida Supreme Court’s decision had violated the equal protection clause, with two dissenting justices (Breyer and Souter) also agreeing that the varying standards in different Florida counties presented constitutional problems.²³⁵ Three of the seven (Rehnquist, Scalia, and Thomas) also argued that the Florida Supreme Court had violated Article 2 of the Constitution that requires legislatures to choose the manner for selecting electors.²³⁶ All five members of the majority agreed that there was no way to produce a timely remedy for the election.²³⁷ Interestingly, the majority stated in their opinion that *Bush v. Gore* was not to be interpreted as a precedent.

Each of the dissenting justices (Stevens, Breyer, Souter, and Ginsburg) wrote his/her own dissenting opinion in addition to signing all or parts of others. Unlike the two majority opinions, the dissenting opinions addressed many issues, from Breyer’s declaration that “The Court was wrong to take this case” to Stevens’s warning that “Preventing the recount from being completed will inevitably cast a cloud on the legitimacy of this election.”²³⁸ Justice Souter attempted to explain his position on the constitutionality of the Florida Supreme Court decision: although he recognized constitutional problems with the Florida Supreme Court’s ruling, he did not see any legitimate basis for the U.S. Supreme Court to try and solve it. He, along with Justice Breyer, had offered to send the case back to the Florida court with instructions to

²³⁵ *New York Times* Correspondents 13 December 2000, 304.

²³⁶ Ceaser and Busch 2001, 199.

²³⁷ *Ibid.*

²³⁸ Gillman 2001, 147 and Ceaser and Busch 2001, 199.

establish a uniform standard for counting the ballots.²³⁹ Neither Breyer nor Souter agreed with the majority's opinion that the state of Florida could not comply with the recount by the day the electors met (December 18). In his own opinion, Justice Breyer recalled the disputed election of 1876 and the creation of the Electoral Count Act to remedy future presidential disputes. "The lesson that Congress learned in the election of 1876," he said, was that "in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself."²⁴⁰ Justice Ginsburg, unlike Souter and Breyer, disagreed entirely with the majority opinion – she did not believe the Florida recount raised any equal protection concerns. She clearly indicated her distaste for the result of the case by ending her opinion with "I dissent" rather than the customary "I respectfully dissent." The final dissent, Justice Stevens's dissent, focused on defeating the equal protections argument; he indicated that the equal protections constitutional provision had never before been used to call into question the traditional practice of manually recounting ballots.²⁴¹ Instead, the majority "effectively orders the disenfranchisement of an unknown number of voters whose ballots reveal their intent – and are therefore legal votes under state law – but were for some reason rejected by ballot-counting machines."²⁴²

The next day – day thirty-six of the post-election campaign – Vice President Al Gore finally conceded. In a gracious eight minute speech, he told the American public that although he disagreed with the Supreme Court decision, "partisan rancor must now be put aside."²⁴³ He declared that he would "honor the new president-elect and do everything possible to help him bring Americans together."²⁴⁴ George W. Bush also spoke on December 13, stating that the "nation must rise above a house divided."²⁴⁵ He also said, "I was not elected to serve one party, but to serve one nation. Whether you voted for me or not, I will do my best to serve your interests and I will work to earn your

²³⁹ *New York Times* Correspondents 12 December 2000, 305.

²⁴⁰ Gillman 2001, 148.

²⁴¹ Gillman 2001, 149.

²⁴² Dionne and Krystal 2001, 119-120.

²⁴³ *New York Times* Correspondents 14 December 2000, 310.

²⁴⁴ *New York Times* Correspondents 14 December 2000, 311.

²⁴⁵ *New York Times* Correspondents 14 December 2000, 311.

respect.”²⁴⁶ Thirty-six days and several of lawsuits later, the presidential election of 2000 was finally over.

The Aftermath of *Bush v. Gore*

Debate over the merits of *Bush v. Gore* would continue well into the next year by both proponents and opponents. To opponents, the U.S. Supreme Court was the obvious villain: the five members of the conservative majority were partisan hacks who made a decision consistent with their political preferences but inconsistent with precedent and with what would have been predicted of them given their views in other cases.²⁴⁷ Some even go as far to say that the majority would have ruled differently had Al Gore been leading in the Florida vote and Bush had been the candidate demanding manual recounts.²⁴⁸ On the other hand, the proponents of *Bush v. Gore* commend the decision for its curtailment of judicial activism by the partisan Florida Supreme Court. Bush had consistently been declared the winner in the count on election night and the automatic recounts, it was clear to them that Al Gore was attempting to locate enough votes to overtake Bush, and he didn't seem to be stopping at anything.

Bush v. Gore – an Odious Decision: On January 13, 2001, the following statement appeared in the *New York Times*:

“By stopping the vote count in Florida, the U.S. Supreme Court used its power to act as political partisans, not judges of a court of law.

We are Professors of Law at 120 American law schools, from every part of our country, of different political beliefs. But we all agree that when a bare majority of the U.S. Supreme Court halted the recount of ballots under Florida law, the five Justices were acting as political proponents for candidate Bush, not as judges.

It is not the job of a Federal Court to stop votes from being counted.

By stopping the recount in the middle, the five Justices acted to suppress the facts. Justice Scalia argued that the justices had to interfere even before the Supreme Court heard the Bush team's arguments because the recount might 'cast a

²⁴⁶ Ibid.

²⁴⁷ Gillman 2001, 189.

²⁴⁸ Dover 2003, 77.

cloud upon what [Bush] claims to be the legitimacy of his election.’ In other words, the conservative justices moved to avoid the ‘threat’ that Americans might learn that in the recount, Gore got more votes than Bush. This is presumably ‘irreparable’ harm because if the recount proceeded and the truth once became known, it would never again be possible to completely obscure the facts. But it is not the job of the courts to polish the image of legitimacy of the Bush presidency by preventing disturbing facts from being confirmed. Suppressing the facts to make the Bush government seem more legitimate is the job of propagandists, not judges. By taking power from the voters, the Supreme Court has tarnished its own legitimacy. As teachers whose lives have been dedicated to the rule of law, we protest.”²⁴⁹

The statement was signed by 554 law teachers from 120 schools. Obviously, the U.S. Supreme Court had made a foe of many law professors. “How can I convince my law students now that the integrity of legal reasoning matters?” groaned a law professor after he had read the per curiam opinion of *Bush v. Gore*.²⁵⁰ This was the quintessential problem of *Bush v. Gore* according to law professors: not that the Court intervened in politics, but that the majority’s decision was so unconvincing.²⁵¹

Aside from accusing the Court of acting as Republicans rather than jurists in deciding the issues of the election, these law professors contended that the stay itself was an egregious act of interference with the political process. Legally, the notion of “irreparable harm” was designed as an extraordinary remedy for emergencies of the kind where someone’s life is in danger, the professors said.²⁵² Moreover, the federal courts are not supposed to interfere with state sovereignty unless the state violates federal law or the Constitution – a fact that these particular judges had strenuously upheld during their tenures.²⁵³ In essence, the law professors believed that the U.S. Supreme Court never should have been involved at all with the election, and they dismissed Justices Rehnquist, Thomas, and Scalia’s concurring opinion that alleged constitutional violations.

²⁴⁹ Ackerman 2002, 113.

²⁵⁰ Dionne and Krystal 2001, 299.

²⁵¹ Ibid.

²⁵² Ackerman 2002, 115.

²⁵³ Ibid.

The equal protections argument, however, received by far the most scrutiny by *Bush v. Gore* opponents. First, they argue that the first review of *Gore v. Harris* by the Supreme Court was sent back to the Florida Supreme Court without any hint of an equal protections problem, which could have been resolved at that time.²⁵⁴ They argue that the disclaimer that *Bush v. Gore* was not to be a precedent was present because equal protections claim was exceptionally weak. Hand counts of the vote clearly produces a risk of treating voters inconsistently, but this has never been shown to a violation of the equal protections clause.²⁵⁵ Furthermore, basing the opinion on equal protection seems severely inconsistent with the drastic disparities in vote tabulation procedures that characterize virtually all contemporary elections.²⁵⁶

The weakness of the equal protections argument was to be derived by opponents as the justices interpreting the clause differently than it was conventionally treated. Fairness, the opponents contend, does not require that the government treat all citizens in exactly the same way in all circumstances.²⁵⁷ Fairness does require, however, that citizens not be disadvantaged. In fact, different cities within any particular state inevitably adopt very different election laws. Since these existing election laws inherently will vary from city to city within a particular state, this means that the initial vote counting procedures also varied within the state. The fact that alarming rates of ballot spoilage on Election Night came from largely African American precincts due to cheaper machines, then, should also be a violation of the equal protections clause, opponents contended. Their point was, however, that since different systems were utilized to count the initial vote and therefore different standards of vote-counting applied (e.g. optical scanning machines which were less prone to error versus punch card ballots that were very prone to error), then why was it so essential to develop a uniform standard of vote tabulation in the recounts? Furthermore, the well-publicized *New York Times* investigations of anomalies in Florida revealed that heavily Republican counties were more likely to stretch the rules; for example, allowing absentee ballots that were postmarked after Election Day, whereas this rule was strictly enforced in

²⁵⁴ Dionne and Kristol 2001, 300.

²⁵⁵ Ackerman 2002, 88.

²⁵⁶ Ackerman 2002, 98.

²⁵⁷ Dworkin 2002, 10.

heavily Democratic Counties.²⁵⁸ This begs the question: if the rules were to be stretched in one county, then why could they not be stretched in all of them?

The final subject of *Bush v. Gore* criticism is the majority's claim that the counting of the votes had to stop because there was insufficient time to establish acceptable recounting rules and still complete the count by December 12, 2000.²⁵⁹ As a *Washington Post* commentator put it:

“Once they got into it, the justices realized they really didn’t have the ‘federal question’ that would justify their meddling. But the majority fell right into the Bush strategy of delaying until the new deadline was almost upon them. Then, in their late-night decision, they groaned, ‘Oh, dear, where did the time go?’”²⁶⁰

The December 12 deadline had originated when the Chief Justice Charles T. Wells of the Florida Supreme Court had asked Gore lawyer David Boies on November 20 if he thought that the battles over the Florida vote would have to be determined by December 12.²⁶¹ Boies had responded, “I do, your honor.” Other than that, the December 12 date was essentially arbitrary – but the U.S. Supreme Court upheld the deadline in an apparent deference to the Florida Supreme Court. This deference was seen as extremely ironic to Gore supporters, as the U.S. Supreme Court had refused to defer to the Florida Supreme Court on any other point in the controversy.²⁶² Moreover, this alleged deference was misguided in the first place – the Florida Supreme Court had not explicitly defined a deadline in its ruling, other than the meeting of the Electoral College on December 18. As Yale Law Professor Jed Rubenfeld so succinctly put it, “There was no December 12 deadline. The majority made it up. On this pretense, the presidential election was determined.”²⁶³

***Bush v. Gore* – A Celebrated Decision:** With the entire state of Florida in the midst of recount chaos and a state legislature threatening to send its own slate of electors to the Electoral College, there was a very real constitutional crisis looming if the

²⁵⁸ Dworkin 2002, 15.

²⁵⁹ Ackerman 2002, 21.

²⁶⁰ Dionne and Krystal 2001, 295.

²⁶¹ *New York Times* Correspondents 14 December 2000, 334.

²⁶² Ackerman 2002, 23.

²⁶³ Ackerman 2002, 26.

Supreme Court had not decided in Bush's favor. The defenders of *Bush v. Gore* maintained that the judges in the majority did not act in a partisan or self-serving way, but rather for stability and order – behavior that does have precedent.²⁶⁴ Others, mostly conservative pundits, insisted on assuring the public that the equal protections defense does in fact hold weight. Still others, mostly conservative law professors, agreed that the equal protections claim was exceptionally weak, but that Justices Rehnquist, Scalia, and Thomas's opinion of constitutional violations held much weight.

The first defense – that *Bush v. Gore* prevented a constitutional crisis and resulting chaos – is by far the most widely approved defense. This defense is rooted in the notion that the Supreme Court was in fact the correct avenue to settle the 2000 election dispute (rather than through Congress and the Electoral Counts Act). It goes on to say that the current Supreme Court – particularly the five justices in the majority – have consistently acted as if the greatest threat was that democracy would become too unstructured and too excessive.²⁶⁵ Therefore, the Court's decision was not “partisan hackery,” but rather a preference for order. The failure to intervene might have precipitated a constitutional crisis, a crisis that could precipitate divisions in the American public not seen since the Civil War. A crisis of this magnitude would certainly mar the U.S.'s role in the world as well as the next president's authority, whether it would be Bush or Gore. Chief Justice Rehnquist defended this position himself in *Centennial Crisis*, his book on the similarly disputed election of 1876, when he wrote:

“[The justices who served on the Electoral Commission] may have tarnished the reputation of the Court, but they may also have saved the nation from, if not widespread violence, a situation fraught with combustible uncertainty. In the view of this author, in accepting membership on the Commission, they did the right thing.”²⁶⁶

The second defense, mostly attributed to conservative pundits, sustained the equal protections defense as solid. These pundits decried the recounts in general, alleging that U.S. Supreme Court was merely curtailing the Florida Supreme Court's disturbing display of judicial activism. The decision, they said, rested on a simple

²⁶⁴ Dworkin 2002, 2.

²⁶⁵ Dworkin 2002, 186.

²⁶⁶ Rehnquist 2004, 248.

premise: if there is going to be a manual recount, it should be conducted properly.²⁶⁷

The pundits stressed that the vote on this issue was actually 7-2, since Justices Breyer and Souter had both agreed that the varying standards presented constitutional problems. They assert that the manual recounts should not have been conducted at all; for in Florida's election code, it states that only "legal votes" may be counted – and a "legal vote" is one that was in compliance with the clear voting instructions.²⁶⁸

The final defense showcases the separate majority opinion offered by Justices Rehnquist, Scalia, and Thomas that accused the Florida Supreme Court of violation of Article II, Section I, Clause 2 of the U.S. Constitution, which states: "Each state shall appoint, in such Manner as the Legislature Thereof May Direct," the offices of President and Vice President.²⁶⁹ These defenders, mostly constitutional law professors, maintain that "the litigation phase of the 2000 election was not carried out in accordance with the substantive or procedural provisions of Florida's election law."²⁷⁰ This argument runs parallel with the Bush team argument that the Florida Supreme Court had created "new law" with its ruling, and therefore violated Florida statutes. They charge that the Florida Supreme Court created its own electoral scheme that substituted judicial authority for that of the secretary of state.²⁷¹

The *Miami Herald* Performs Its Own Recount: No sooner had Gore conceded when several newspapers, most notably the *Miami Herald*, decided to perform their own recount to settle who really won the election. They inspected 64,248 undervote ballots, which was the focus of the Gore recount campaign, and the results were quite shocking. Their first conclusion was that "Bush almost certainly would have won the presidential election even if the U.S. Supreme Court had not halted the statewide recount of undervotes ordered by the Florida Supreme Court."²⁷² This result was based on recounts designed along two standards: the inclusive standard advocated by the Gore team and the strict standard advocated by the Bush team. It must be noted that in its ruling the Florida Supreme Court specifically excluded from the statewide recount

²⁶⁷ Dionne and Krystal 2001, 290.

²⁶⁸ Ibid.

²⁶⁹ Sunstein and Epstein 2001, 14.

²⁷⁰ Sunstein and Epstein 2001, 19.

²⁷¹ Sunstein and Epstein 2001, 21.

²⁷² Merzer 2001, 167.

Broward, Palm Beach, Volusia, and 139 precincts in Miami-Dade where manual recounts had already been conducted.²⁷³ Ironically, using the inclusive standard encouraged by Gore's lawyers actually added 1,128 votes to his official 537-vote lead, totaling, 1,665.²⁷⁴ Using the strict standard, Bush's lead diminished to 363 if only hanging chads were counted and it would have vanished completely to a Gore win by only three votes if only clean punches were accepted.²⁷⁵ However, if consistent standards had been used in Broward and Palm Beach Counties allowing the counts to proceed the entire time under the inclusive standard, Gore would have been credited another 2,022 votes – making him the winner.²⁷⁶

A similar inspection of the Florida overvotes (which totaled 110,000 – about one of every fifty voters), though not requested by either Bush or Gore during the post-election period, revealed that Gore was undoubtedly harmed more by invalidation of the overvotes. In Palm Beach County alone, 5,264 votes were for Gore and Buchanan, 2,862 for Gore and Socialist McReynolds, and 1,319 for Gore and Libertarian Browne.²⁷⁷ Statistical studies show that most of these votes were intended for Gore, but voters were confused by the butterfly ballot. Confusing ballot design was not a feature of Palm Beach County alone; this problem plagued several counties - most notoriously Volusia and Duval Counties – but it was determined in many cases that the overvote problem correlated directly to a county's wealth and literacy rate.²⁷⁸

The chief result of the *Miami Herald* examination was this: "If Florida law had clearly mandated a manual examination of all machine-rejected ballots between Election Day and official certification of the election, thousands of additional votes would have been salvaged and the outcome of the election might have been different."²⁷⁹ In its examination of the overvotes, it concluded that legally most of these votes were lost forever, but a good portion could have been recovered as legal votes. For example, in counties that used optical scanning voting equipment, some people voted for Gore and then again for his running mate Lieberman, and the same thing happened with Bush

²⁷³ Merzer 2001, 171.

²⁷⁴ Merzer 2001, 168.

²⁷⁵ Ibid.

²⁷⁶ Merzer 2001, 169.

²⁷⁷ Merzer 2001, 189.

²⁷⁸ Gillman 2001, 167.

²⁷⁹ Merzer 2001, 189.

and Cheney.²⁸⁰ Throughout the state, many people voted for Bush or Gore – and then did so again in the write-in category.²⁸¹ Many people also did not vote for Gore or Bush in its proper place on the ballot, and instead wrote in Gore or Bush in the write-in category. It is clear from these studies that hundreds, if not thousands, of votes with determinable “voter intent” could have been recovered by manual statewide examination of the undervotes and overvotes together.

²⁸⁰ Merzer 2001, 188-189.

²⁸¹ Ibid.

Chapter 5: The Presidency of George W. Bush

George W. Bush was inaugurated as the forty-third president of the United States on January 20, 2001 by Chief Justice of the U.S. Supreme Court William Rehnquist, which many Democrats found to be ironic. Only a month and a week had passed since the tumultuous election had finally drawn to a close, and the demonstrations at his inauguration proved that tensions still had not calmed. Just days before his inauguration, a Zogby poll put his approval rating at just 42% – he was obviously going to have to earn the trust of the American people, particularly those who did not believe he was the rightful president.²⁸²

But Bush did not govern in the careful and deliberate manner that many commentators believed was necessary to earn the trust of the American people after the disputed election. Instead, in a move that some resented but others deemed brilliant, Bush governed from the beginning as if he had a clear mandate from the public for his strongly conservative economic, domestic, and foreign policy agenda.²⁸³ He chose his cabinet quickly in order to be able to “hit the ground running” – a strategy that would help him to avoid missteps of the early Clinton administration and alleviate the skepticism over his ability to govern.²⁸⁴ He also decided to push the issues of his campaign early in his presidency – especially his tax cut. Remarkably, he was successful in this endeavor, implementing a \$1.3 trillion tax cut with the support of many Senate Democrats. Titled the Economic Growth and Tax Relief Reconciliation Act of 2001, the legislation effectively lowered tax rates and simplified retirement and qualified plan rules.²⁸⁵ However, the Democrats – who were the majority party after May 2001 when Vermont Republican James Jeffords defected – were largely able to block the Bush domestic agenda during the spring and summer of 2001.²⁸⁶ At that point, it looked as if the Bush presidency would be characterized as highly partisan and would consist

²⁸² Zogby Poll, <http://www.peacereading.org/Bush's%20Approval%20Ratings%20Continue%20to%20Fall.htm> (accessed 3 April 2005).

²⁸³ Schier 2004, 17.

²⁸⁴ Greg and Rozell, 38.

²⁸⁵ Wikipedia Encyclopedia, http://en.wikipedia.org/wiki/Economic_Growth_and_Tax_Relief_Reconciliation_Act_of_2001 (accessed 3 April 2005).

²⁸⁶ Schier 2004, 27.

of legislative gridlock.²⁸⁷ His poll numbers had remained solid at first as people who had relatively low expectations of him at first were pleasantly surprised at his ability to govern, but as the summer of 2001 passed and people were becoming less enchanted with his performance as president. His approval rating after his first hundred days in office on August 27, 2001 according to Zogby was 50% positive and 49% negative.²⁸⁸

The September 11, 2001 terrorist attacks on New York City and Washington, D.C. were devastating to the country, but offered unique circumstances and opportunities for President Bush. That night, he declared America's response to the crisis would be a "war on terror," and the result was a soaring approval rating of 85%, up from 50% on September 10 – some of which was motivated by patriotism, but most of which was true respect for the president. Congress, which had been characterized by partisan split during the spring and summers of 2001, saw that it was in its best interests to unite in order to tackle the new policy agenda of terrorism, defense, and foreign relations – which certainly contributed to the good image of the Bush administration. Congress passed resolutions giving President Bush the authority to proceed with military action, without the declaration of war that the Constitution requires.²⁸⁹ The war on terror would be the dominating feature of Bush's first term.

On October 8, 2001, President Bush announced the first executive-level office to be created since 1988, the Office of Homeland Security, to be headed by former Pennsylvania Governor Tom Ridge.²⁹⁰ The goal of the Office of Homeland Security was, "to develop and coordinate the implementation of a comprehensive national strategy," and, "to secure the United States from terrorist threats or attacks." On March 12, 2002, the Department of Homeland Security unveiled the Homeland Security Advisory System, which was "a color-coded scale created to illustrate the probable level of threat currently posed by terrorists, based on various intelligence reports."²⁹¹

²⁸⁷ Ibid.

²⁸⁸ Zogby Poll, <http://www.peaceredding.org/Bush's%20Approval%20Ratings%20Continue%20to%20Fall.htm> (accessed 3 April 2005).

²⁸⁹ Zinn 2003, 678.

²⁹⁰ Wikipedia Encyclopedia, http://en.wikipedia.org/wiki/George_W._Bush%27s_first_term_as_president_of_the_United_States (accessed 3 April 2005).

²⁹¹ Ibid.

A second feature of Bush's response to the terrorism was the Patriot Act, which sailed through Congress (357-66 in the House, 98-1 in the Senate) in October of 2001. In recognition of a wartime environment, the Patriot Act tightened domestic security measures. According to Peri Arnold, Government professor at Notre Dame University,

“[The Patriot Act] expanded the powers of federal agencies in domestic surveillance and internal security actions. It expanded the capacities of those agencies to gain information about individuals' choices and communications from libraries, Internet service providers and retail merchants. And it expanded the activities that could be covered by the legal definition of terrorism and gave U.S. foreign intelligence agencies freedom to conduct domestic intelligence activities.”²⁹²

Although the Patriot Act had received huge support in Congress, it eventually became a controversial subject with the public as citizens were denied due process rights. However, it certainly had public support at the time of its passage because most Americans felt safer because of the president's expanded powers in domestic security.²⁹³

The final feature of Bush's initial response to the September 11th attacks was the deployment of 11,000 U.S. troops to Afghanistan and aerial bombings that commenced on October 7, 2001, or Operation Enduring Freedom. Operation Enduring Freedom was not a unilateral action by the U.S., it was supported by the United Kingdom and the North Atlantic Treaty Organization (NATO) alliance. The goal of the invasion was to overthrow the Taliban government of Afghanistan, an Islamic fundamentalist group which was thought to be harboring Osama Bin Laden and Al-Qaeda.²⁹⁴ The Taliban had fallen by mid-November, and by December 20, 2001 the United Nations Security Council authorized “the deployment of a peacekeeping force to provide stability for the Afghan interim government.”²⁹⁵

²⁹² Schier 2004, 155-156.

²⁹³ Schier 2004, 156.

²⁹⁴ Wikipedia Encyclopedia, http://en.wikipedia.org/wiki/George_W._Bush%27s_first_term_as_president_of_the_United_States, (accessed 3 April 2005).

²⁹⁵ Hilliard, Landsford, and Watson 2004, 147.

The war on terror, however, did not prevent President Bush from completing important features of his domestic agenda from the previous year. On January 8, 2002, after nearly a year of negotiations in Congress, he signed into law the “No Child Left Behind Act of 2001,” a six-year reauthorization of the Elementary and Secondary Education Act first passed in 1965.²⁹⁶ No Child Left Behind kept intact the highly complex structure of federal education policy, and made modest reforms of the Governor Bush model in Texas. The act’s goal was improvement in the performance of America’s primary and secondary schools, to be achieved by expanding the standards of accountability for states, school districts, and schools, as well as providing parents more flexibility in choosing which schools their children will attend.²⁹⁷ The No Child Left Behind Act in its final version garnered wide and bipartisan support from Congress, passing 381 to 41 in the House and 87 to 10 in the Senate.

After the election of 2000, many believed that the Republicans would suffer in the 2002 midterm elections. However, the combination of September 11th and Bush’s strategy of active campaigning for the midterm elections made the public forget the irritation of the last election and instead yielded remarkable results for the Republicans: a gain of six seats in the House and two in the Senate, giving them majority status in both. These results were absolutely historic, for it was the first time in over a century that a president’s party had regained control of the Senate in a midterm election, and it was the first election since 1934 in which the president’s party gained seats in both houses of Congress in a first-term midterm election.²⁹⁸ Moreover, it marked an end to the previous eight years of divided government, since Republicans now controlled all three branches.

Although these domestic successes were important, Bush’s foreign policy, particularly the war on terror, overshadowed virtually everything else. In his 2002 State of the Union Address, he unveiled the Bush post-September 11 foreign policy:

“Our second goal is to prevent regimes that sponsor terror from threatening America or our friends and allies with weapons of mass destruction...Iraq continues to flaunt its

²⁹⁶ Hilliard, Landsford, and Watson 2004, 105.

²⁹⁷ Wikipedia Encyclopedia, http://en.wikipedia.org/wiki/No_Child_Left_Behind_Act, (accessed 3 April 2005).

²⁹⁸ Gregg and Rozell 2004, 153.

hostility toward America and to support terror. The Iraqi regime has plotted to develop anthrax and nerve gas and nuclear weapons for over a decade. This is a regime that has already used poison gas to murder thousands of its own citizens, leaving the bodies of mothers huddled over their dead children. This is a regime that agreed to international inspections then kicked out the inspectors. This is a regime that has something to hide from the civilized world.

States like [North Korea, Iran, and Iraq], and their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world. By seeking weapons of mass destruction, these regimes pose a grave and growing danger. They could provide these arms to terrorists, giving them the means to match their hatred. They could attack our allies or attempt to blackmail the United States. In any of these cases, the price of indifference would be catastrophic.”²⁹⁹

This policy would later evolve into the Bush Doctrine in the fall of 2002, which consisted of four main elements: first, a policy of preemptive war; second, the right to unilateral military action; third, a policy of U.S. military superiority; and fourth, a policy promoting democracy and freedom everywhere in the world.³⁰⁰ The Bush Doctrine would be put into practice beginning in March of 2003 with Operation Iraqi Freedom, a preemptive war waged by the U.S. and a “coalition of the willing” to overthrow Saddam Hussein’s dictatorship.

The Iraq War would become Bush’s most controversial action of his first term and consequently a catalyst that would simultaneously undo his high approval ratings and divide the nation. Bush would base his claim on the necessity for preemptive war with Iraq on the presence of chemical and nuclear weapons of mass destruction (WMDs) in the country and the character of dictator Saddam Hussein has always been a nuisance but was downright threatening in possession of WMDs.

The Iraq war was and continues to be controversial on several levels. First, Bush was attacking a country that had never attacked or threatened to attack the United States. Second, the Iraq War had not received UN support nor the multilateral support of the Persian Gulf War in 1991 – it was essentially the United States and the British

²⁹⁹ CNN, <http://archives.cnn.com/2002/ALLPOLITICS/01/29/bush.speech.txt/> (accessed 3 April 2005).

³⁰⁰ Wikipedia Encyclopedia, http://en.wikipedia.org/wiki/Bush_Doctrine (accessed 3 April 2005).

fighting alone, because the “coalition of the willing” included rather small and weak countries that could not provide much assistance. Moreover, Bush had not asked for a congressional declaration of war, which critics assert stank of the Tonkin Gulf memory. Third, President Bush was accused of using the September 11 attacks as an excuse to finish off Saddam Hussein – for he had publicly criticized his father for not “finishing the job” after the Persian Gulf War – even though there were virtually no ties between Al Qaeda and Saddam Hussein. Fourth, the Iraq War has caused severe tension with traditional U.S. Allies, such as France, Germany, and Europe in general, and has inhibited the U.S.’s moral position in the world. Fifth, the Iraq Survey Group concluded in January of 2005 that there were no weapons of mass destruction in Iraq, severely damaging public trust in the president. Finally, “Mission Accomplished” was declared in May of 2003, less than two months after the war commenced, and it has been two years to date and the fighting in Iraq continues. Nevertheless, Bush has had success with the Iraq War. After all his objective was achieved: the Iraqi government has been overthrown and Saddam Hussein has been taken into custody. The Iraq War would prove to be a huge issue in the election of 2004.

After the capture of Saddam Hussein in December 2003, many thought that Bush had also captured reelection for 2004. Yet, in January of 2004, a full eight months since the infamous “Mission accomplished” and a month after the capture of Hussein, his approval ratings were back down at 50%. Maybe the country was polarized enough after all to deny Bush reelection. Perhaps the memories of 2000 would return to haunt him at last, with September 11th three years removed and therefore less capable of distracting the people.

2000, however, did not return to haunt Bush’s chances of success at reelection, even though Democrats calls for voters to “redefeat” Bush. The Democratic challenger was Massachusetts junior Senator John Kerry, an honorable but dull opponent. Kerry challenged Bush on his conservative domestic policies, the war in Iraq, the environment, and the economy. Bush in turn accused Kerry of “flip flopping” on the issues, most notably the war in Iraq. He stressed his record in the aftermath of September 11th, and promised to keep America safe from terrorism. He promoted virtually the same domestic platform as 2000 and characterized himself as Ronald

Reagan's heir. Though the campaign was close and bitterly fought towards the end, Bush ultimately prevailed – indisputably, this time, winning Florida by 400,000 and the ultimate battleground state of Ohio by 119,000 as well as the popular vote by four million. He won the Electoral College 286 to Kerry's 252, and Kerry conceded the day after Election Day.

Conclusions

When George W. Bush was effectively handed the presidency by five Supreme Court justices, many commentators speculated that the Republicans could be in for trouble in the midterm elections of 2002 and the presidential election of 2004. Yet, the opposite occurred – the Republicans actually *prevailed* in both elections. Many wondered how the legacy of the 2000 proved to be so short lived – and the answer certainly lies in the extraordinary event of September 11th and Bush's brilliant strategy team.

Although September 11th was by far the most tragic event of modern U.S. history, it was also the miracle revival drug for President George W. Bush. It allowed Bush to step up and shine in an area where initial standards of him were low. It was a tragedy that gripped every home in the country, and sparked the realization that maybe we as Americans are not so different after all. This, in turn, restored enormous support into American government, and consequently the Bush presidency. He was able to utilize his own support by filtering it into the Republican Party, which could later claim the success of his administration. September 11th was also an opportunity for him to delve into foreign policy, under the guise of keeping Americans safe – and quite possibly securing his reelection, since Americans have historically never changed administrations during wartime.

Yet, one cannot ignore his brilliant – or perhaps lucky – strategy when answering the question of Bush's political success. Although it is debatable to whether Bush's strategy would have worked without the event of September 11th, one has to admire his team's perseverance. Instead of acknowledging his weak claim to the presidency and setting out on a moderate path, he instead ignored his route to the presidency and governed as if he were given a mandate. This allowed him and his party to taste

success with their agenda very early in his presidency, and not to be guilty of the stalemate of the honeymoon period. After his success dealing with the terrorist attacks of September 11th, he was able to consolidate and prolong his support through the midterm elections. Furthermore, he engaged himself in the previous no-no of intervening in Congressional midterm elections and defied history when his party took back the Senate. Finally, he campaigned vigorously for his reelection and presented himself – and his same policies – to the American people once again with four years of experience in the nation's top job, and the American people decided that it was okay if he stayed.

The legacy of the 2000 election, however, has not completely faded away. It reminded the American people that every vote does indeed count, and consequently the 2004 election had the highest voter turnout in years. Moreover, it cast an enduring shadow on the American political process, which has led many to question whether the Electoral College is in need of replacement given its inherent bias towards small states. And most importantly, the division that occurred in the American public after the 2000 election has become even sharper after a brief interlude of apparent unity following September 11th as the Republicans become more conservative and the moderates and liberals stagnate. This division is concentrated in the ongoing legacy of President George W. Bush – 51% of the population voted for him in 2004, but one has to remember that 48% also voted against him, and a majority of that 48% deemed another four years of his presidency as intolerable.

Nevertheless, the moral of the story is that the 2000 election has largely been overshadowed by September 11th. *Bush v. Gore* – though still a disturbing decision to most constitutional law scholars – has largely been granted the same fate, tucked away neatly in the pre-September 11th world. It is impossible to say how Bush's presidency would have turned out had it not been for September 11th, which radically altered the course of American history.

Chapter 4: Conclusions

The elections of 1876 and 2000 demonstrate both a criticism and a commendation of American constitutionalism: first, the American system is not perfect; and second, however imperfect the system may be, it will ALWAYS yield a result that will be accepted as legitimate. It is generally regarded that the commendation takes priority over the criticism, because it is impossible to achieve perfection in an imperfect world and the stability of a political system is founded on the public's ability to accept the results of political processes. Although hotly contested at the time, the elections of 1876 and 2000 represent only two cases of deadlock out of a total of fifty-four elections held in U.S. history. The point is, then, that the American constitutional system is capable of breakdown, but these breakdowns occur infrequently and are always resolved within the confines of the existing system. And the occurrence of these breakdowns is not all necessarily bad, as it imposes an education of the Constitution and electoral procedures on a largely ignorant American public.

The legitimacy of the presidents resulting from the elections of 1876 and 2000 – Rutherford B. Hayes and George W. Bush – cannot be disputed. Even some of the most vehement opponents of the two elections' results accepted the outcomes, even if only indicated by a tacit reference to "President Hayes" or "President Bush." Furthermore, there were no riot-like efforts to install either of the losing candidates by force. This legitimacy is reinforced by the fact that the controversial nature of the two elections was virtually forgotten within six months of inauguration, let alone four years later. There is no evidence that demonstrates that the elections of 1880 or 2004 were affected at all by the immediately previous elections – in fact, another Republican, James A. Garfield (who was incidentally an instrumental figure in the election of 1876), won the election of 1880 and George W. Bush was definitively reelected in 2004.

Since 124 years separated the two elections, difficulties arise when one attempts to analyze them together. This becomes evident especially when one recognizes the huge shift in world status of the United States between the two elections as well as the technological differences. The result of these two difficulties in addition to other more minor difficulties is that the fundamental meanings of the election's outcomes are truly

distinct. Nevertheless, they will be analyzed separately first followed by a synthesis debate regarding the question of power in both elections.

The Election of 1876: The election of 1876 was the closest presidential election in American history, since the closest disputed state (Florida) declared Hayes the winner by only forty-three votes. Yet, the election was largely forgotten by the American public by the year 2000 and its resulting president, Rutherford B. Hayes, classified with the likes of several other Gilded Age presidents that no one can remember. With such an important civics lesson at stake, how could Americans have forgotten this landmark election?

The answer is: because the election of 1876 was not a landmark election. The combination of its moral pretenses in complement to its bipartisan resolution exemplifies its consistency with usual American politics. In essence, the election was not landmark because its resolution did not lead to any significant changes in the political process, nor did it ignite old Civil War tensions. Business was as usual on March 5, 1877, with the exception of a few grumbling newspaper journalists. This indicates the resilience and success of the American political system at a time when political tensions were sharper than usual.

If one were to simplify the election of 1876 into a recurring phrase, the two phrases that would dominate are “free and fair” and “illegal and false.” The former is of course in reference to the questionable treatment of blacks in the three disputed southern states, and the latter is President Grant’s standard on how votes in the disputed states should be resolved. The outcome of the election of 1876 dictates one premise: the elections in South Carolina, Louisiana, and Florida were not free and fair. This principle would ultimately guide the election’s resolution. Even though the Republican and Democratic parties were of theoretical equal stature in 1876, it would not be inaccurate to claim that even through the scandalous Grant administration, the Republicans retained the moral upper hand as the victors of the Civil War. Moreover, they still controlled the majority of the branches of government, including the carpetbag regimes still in place from Reconstruction. The Democrats probably consciously or unconsciously knew that they could not fight to the death for their or man without risking

a second Civil War. Therefore, it was difficult for them to dispute the Republican claim that the election was not “free and fair” and consisted of “illegal and false” returns.

One cannot ignore the importance of the Electoral Count Bill of 1877. Here was a bill, sponsored by Democrats but approved by a Republican Senate and signed by a Republican president that systematically solved the problem of the disputed election. It was an admirable bill because it recognized the extreme partisan nature of both the ballot-counting by the canvassing boards and the certification by election officials. Although the Democrats decried the bill after Justice David Davis made it clear that he would not serve on the committee, the bill still prevailed as a law that had once been approved by both parties. This solution is fitting for the time, given the preeminence of Congress during the Gilded Age.

The subsequent moderation of President Rutherford B. Hayes is also integral when assessing the legacy of the election of 1876. Hayes was not an Old Guard candidate to begin with, but if he had pursued Old Guard-style policies in his term, he certainly would not have been tolerated by the Democrats. In fact, it is likely that the Democrats were so conciliatory to Republicans towards the end of the post-election period because the candidate Hayes was tolerable to them. Whether his moderation was inherent or whether it was specifically in response to the conditions of his election, it was ultimately an astute political choice given the circumstances. Although Hayes is not remembered as one of the “great” presidents anyway, his legacy would have been considerably lower had he chosen to govern with a mandate.

The Election of 2000: Whereas the election of 1876 was largely about voter disenfranchisement, particularly that of blacks, the legacy of the 2000 election concentrates more on the limits of technology defining the appropriate venue to resolve election disputes, and the final resolution materialized through *Bush v. Gore*. Since not much appeared to be at stake in 2000, a time of relative calm and prosperity, the debate of the election of 2000 is far more concentrated in the principles of the election instead of the candidates themselves. Moreover, the September 11th terrorist attacks completely discount any feasible method of evaluating Bush’s performance as president in light of his perceived illegitimacy.

The emphasis on technology must be acknowledged; in 1876, there were no ballot counting machines and the votes had to be counted by hand, while in 2000 one of the major debates was over whether a hand-count could be conducted objectively. The problem of 2000, as evidenced through the *Miami Herald* recounts, was that hundreds of legitimate votes were mistakenly thrown out by faulty machines. These machines were arbitrarily penalizing voters, which could be especially problematic in counties whose voters are heavily Republican or Democratic. This is demonstrated by the noticeably different levels of ballot spoilages in counties that use punch card ballots versus counties that use optical scanning, 4% and .5% respectively. The use of punch card versus optical scanning equipment also corresponded with the wealth level of a given county – the richer counties tended to use optical scanning machines while the poorer counties tended to use punch card ballots. It also came to light that voting totals could change even after a machine recount – indicating that perhaps technology is not so infallible after all. Thus, the election of 2000 proved that technology can be both faulty and discriminatory – the question remains, however, whether the alternative of manual recounts is much better.

The bigger question in the legacy of the election of 2000, however, is the judiciary's preeminent role in determining the ultimate winner, and *Bush v. Gore* in particular. The comparison between 1876 and 2000 is obvious: Congress produced a bill to settle the dispute in 1876 (which did ultimately involve a final decision made by a Supreme Court justice), whereas the election of 2000 was determined through the outcomes of several lawsuits. Moreover, the 1876 debacle had produced legislation addressing future election disputes in the form of the Electoral Count Act of 1887, which essentially gives states – and the state legislatures in particular – the power to determine their electors. With such a law already in place, why was the judicial system deemed the appropriate avenue in which to settle the election dispute?

Although cited by the Bush team in various arguments used in the contested election case, the Electoral Count Act of 1887 was never a major force in the election of 2000. Perhaps this is because its statutory remedies were always of questionable constitutionality, and thus territory the Bush team did not want to pursue. Nevertheless, the Bush team chose to file a lawsuit within days of November 7th rather than to allow

the recounts, which were legal under Florida law, to continue. The Gore team did the same, though indirectly through the plaintiffs of the butterfly ballot case. This behavior of actively influencing the outcome of the election is in direct contrast to 1876, in which both candidates largely did nothing after the initiation of the election dispute. This indicates the growing preeminence of the judiciary in the twentieth century as legitimate lawmakers.

Going to court in the late twentieth and early twenty-first centuries is the accepted and common method in order to solve disputes, and it would indeed have seemed odd, if not arrogant, if Congress had taken it upon itself to resolve the dispute. After all, why should a body of presumably wealthy and powerful white men decide what to do with thousands of inconclusive Florida ballots? It seemed much more reasonable (and in line with federalist principles) to keep the election as localized as possible, with only direction from federal/state courts. Furthermore, the judiciary is regarded by most Americans as a politically impartial venue, whereas Congress's partisanship is obvious. Taking the 2000 election to court, then, seemed like the fairest method to the American people to resolve the election dispute at the time.

The problem, however, was that when the general perception of impartial judges began to unravel, solving the election dispute in the judiciary did not seem like such a good idea anymore – especially when *Bush v. Gore* yielded a seemingly partisan result. The result of the election of 2000 was probably more frustrating than to Gore supporters in 2000 than Tilden supporters in 1876 because Democrats in 1876 had at least initially agreed to the Electoral Count Act of 1877, whereas in 2000 it seemed as if Bush allies were in all the key positions to determine the election's outcome. Nevertheless, it must be noted that the U.S. Supreme Court did not take a noticeable hit regarding public confidence, implying that most Americans did agree that it was the appropriate venue to resolve the election.

The final point of contention in the election of 2000 was *Bush v. Gore* itself. There is general agreement among law professors, judges, and pundits that *Bush v. Gore* is an incredibly weak case. The Supreme Court majority itself even seems to imply its awareness of *Bush v. Gore*'s weakness by its preemptive clause that excludes *Bush v. Gore* from legal precedent. The equal protections claim has been absolutely

decimated, and the alleged constitutional violation proposed by Justices Rehnquist, Scalia, and Thomas has not provided much more comfort to these scholars. Yet, one cannot ignore the unstated but rock-solid defense of *Bush v. Gore* – that the justices were ending the recounts on the basis of upholding the dignity of the American system and preventing chaos. It is difficult to even speculate what might have occurred had the recounts proceeded, much less how this would have impacted the election of 2004. Thus, the likely ulterior motive of the conservative justices certainly cannot be easily dismissed, no matter how unfair the whole election may have seemed to some.

The Question of Power: The question of power debate is defined by the extent to which those in positions of authority with respect to presidential elections can influence the outcome of these elections when the results are disputed. Since national and even state politics are characterized as overwhelmingly partisan (e.g., there are very few nonpartisan positions), it is assumed that most election officials are affiliated with a political party. By analyzing the elections of 1876 and 2000, the answer seems to be that when certain positions are dominated by the same party, this party has much influence in determining the election's outcome. In 1876, the Republicans controlled the Senate, executive branch, and judicial branch on the national stage, as well as the canvassing boards and governorships of the disputed states. The Democrats controlled only the House of Representatives. In 2000, the Republicans controlled Congress, the U.S. Supreme Court, the executive branch of Florida, and the Florida Legislature. The Democrats controlled the presidency and the Florida Supreme Court. Clearly, the Republicans had the advantage in both cases. The Republican advantage in 1876 was more concentrated on the state level – had there not been carpetbag Republican governors in South Carolina, Florida, and Louisiana in 1876 (who were all replaced by Democrats in that election), the states never would have been held in the first place. Moreover, Republican control of the canvassing boards was also integral, since it was the canvassing boards that determined what constituted a legal vote. In the case of Oregon, the Democrat governor certified the results with the split electors (two Republican electors and one Democrat) rather than all three Hayes electors, even though the state had clearly gone to Hayes. The Republican advantage at the state level was also essential in 2000, with a more minor role delegated to the U.S. Supreme

Court. Had a Democrat been in the key position of Florida Secretary of State, the recounts certainly would have proceeded differently and perhaps the election reversed.

These correlations between election power positions and outcomes are hard to ignore. They signify that the American democratic system in practice is far from ideal, and these biases are virtually impossible to eliminate or even control.

The elections of 1876 and 2000 both serve as lessons to American citizens. Most generally, every vote does indeed count. But more importantly, our American system is intriguing, complex, and – to some – outmoded, but it is also an incredibly steadfast system that will always produce results. We may not agree with these results, but there will always be a legal justification for them. And in the case of a disputed presidential bid, no matter who emerges as the victor, the nation will inevitably support him/her. For we know that there will always be another election in four years, and that is usually enough.

Appendix I: Electoral Map of 1876 and Summary

From <http://www.presidentelect.org/e1876.html>

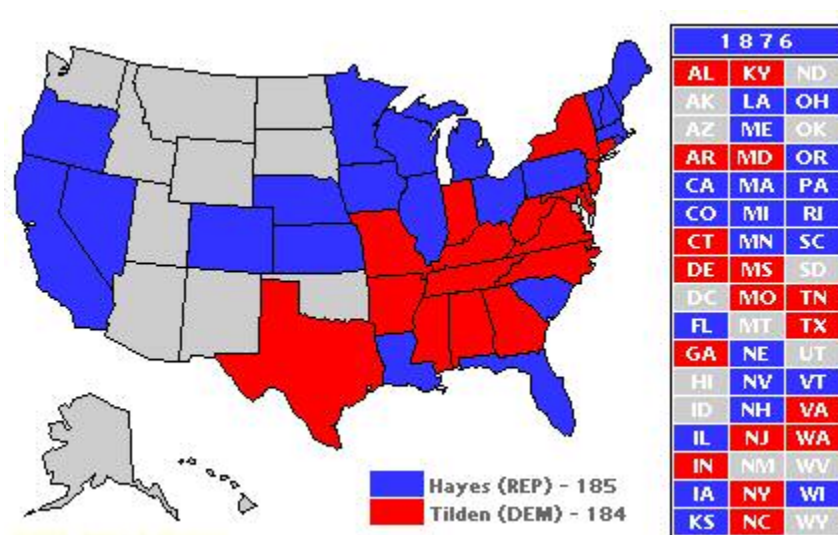



Figure 2: State by State Analysis in 1876

In 1876, 369 electoral votes were available; 185 votes were needed to secure the win.					
STATE	HAYES	TILDEN	COOPER	OTHERS	EVs
ALABAMA	68,708 (40.0%)	102,989 (60.0%)	-	2 (>0.1%)	10
ARKANSAS	38,649 (39.9%)	58,086 (59.9%)	211 (0.2%)	-	6
CALIFORNIA	79,258 (50.9%)	76,460 (49.1%)	47 (>0.1%)	19 (>0.1%)	6
COLORADO 	Hayes				3
CONNECTICUT	59,033 (48.3%)	61,927 (50.7%)	774 (0.6%)	400 (0.3%)	6
DELEWARE	10,752 (44.6%)	13,381 (55.5%)	-	-	3
FLORIDA	23,849 (51.0%)	22,927 (49.0%)	-	-	4
GEORGIA	50,533 (28.0%)	130,157 (72.0%)	-	-	11

ILLINOIS	278,232 (50.2%)	258,611 (46.7%)	17,207 (3.1%)	318 (0.1%)	21
INDIANA	208,011 (48.3%)	213,529 (49.5%)	9,533 (2.2%)	-	15
IOWA	171,326 (58.4%)	112,121 (38.2%)	9,431 (3.2%)	520 (0.2%)	11
KANSAS	78,324 (63.1%)	37,902 (30.5%)	7,770 (6.3%)	138 (0.1%)	5
KENTUCKY	97,568 (37.4%)	160,060 (61.4%)	-	2,998 (1.2%)	12
LOUISIANA	75,315 (51.7%)	70,508 (48.4%)	-	-	8
MAINE	66,300 (56.6%)	49,917 (42.7%)	-	828 (0.7%)	7
MARYLAND	71,980 (44.0%)	91,779 (56.1%)	-	-	8
MASSACHUSETTS	150,063 (57.8%)	108,777 (41.9%)	-	779 (0.3%)	13
MICHIGAN	166,901 (52.4%)	141,665 (44.5%)	9,023 (2.8%)	837 (0.3%)	11
MINNESOTA	72,962 (58.8%)	48,799 (39.3%)	2,399 (1.9%)	-	5
MISSISSIPPI	52,603 (31.9%)	112,173 (68.1%)	-	-	8
MISSOURI	145,027 (41.4%)	202,086 (57.6%)	3,497 (1.0%)	-	15
NEBRASKA	31,915 (64.8%)	17,343 (35.2%)	-	-	3
NEVADA	10,383 (52.7%)	9,308 (47.3%)	-	-	3
NEW HAMPSHIRE	41,540 (51.8%)	38,510 (48.1%)	-	93 (0.1%)	5
NEW JERSEY	103,517 (47.0%)	115,962 (52.7%)	714 (0.3%)	-	9
NEW YORK	489,207 (48.2%)	521,949 (51.4%)	1,978 (0.2%)	2,369 (0.2%)	35
NORTH CAROLINA	108,484 (46.4%)	125,427 (53.6%)	-	-	10
OHIO	330,698 (50.2%)	323,182 (49.1%)	3,058 (0.5%)	1,712 (0.3%)	22
OREGON	15,207 (50.9%)	14,157 (47.4%)	509 (1.7%)	-	3
PENNSYLVANIA	384,157 (50.6%)	366,204 (48.3%)	7,209 (1.0%)	1,403 (0.2%)	29
RHODE ISLAND	15,787 (59.6%)	10,712 (40.4%)	-	-	4
SOUTH CAROLINA	91,786 (50.2%)	90,897 (49.8%)	-	-	7

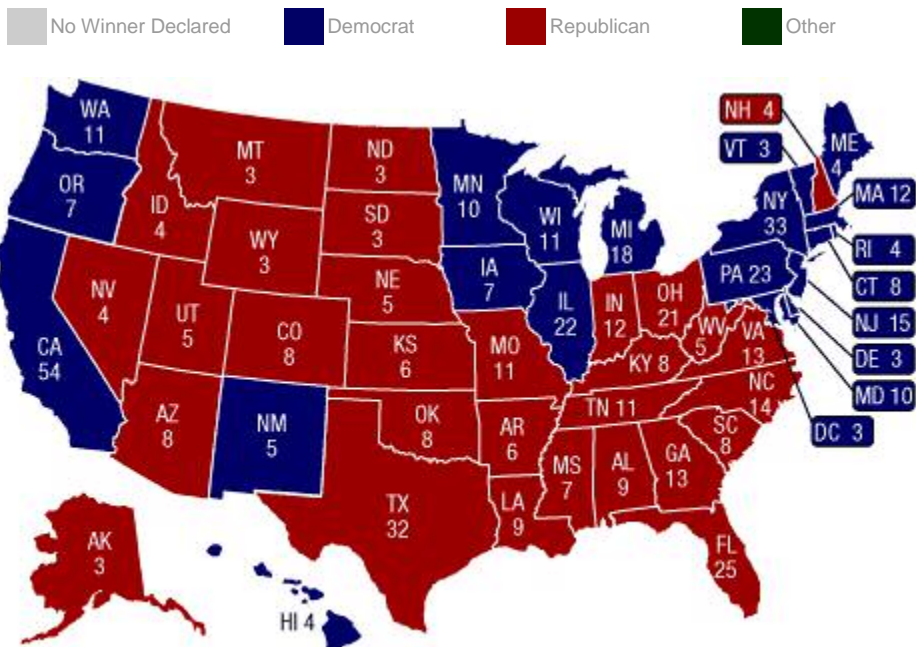
TENNESSEE	89,566 (40.2%)	133,177 (59.8%)	-	-	12
TEXAS	45,013 (29.7%)	106,372 (70.2%)	-	46 (>0.1%)	8
VERMONT	44,092 (68.4%)	20,254 (31.4%)	-	114 (0.2%)	5
VIRGINIA	95,518 (40.4%)	140,770 (59.6%)	-	-	11
WEST VIRGINIA	41,997 (42.2%)	56,546 (56.8%)	1,104 (1.1%)	-	5
WISCONSIN	130,050 (50.6%)	123,922 (48.2%)	1,509 (0.6%)	1,695 (0.7%)	10
TOTALS	4,034,311 (48.0%)	4,288,546 (51.0%)	75,973 (0.9%)	14,271 (0.2%)	
ELECTORAL VOTES	185	184	0	0	

Appendix 2: Electoral Map of 2000 and Summary

From:

<http://www.washingtonpost.com/wpsrv/onpolitics/elections/2000/results/whitehouse/>

State-by-State Electoral Votes



Presidential Election of 2000, Electoral and Popular Vote Summary

From: <http://www.infoplease.com/ipa/A0876793.html>

Principal Candidates for President and Vice President:

Republican—George W. Bush; Richard B. Cheney (winner)

Democratic—Albert A. Gore, Jr.; Joseph I. Lieberman

Green—Ralph Nader; Winona LaDuke

	George W. Bush		Albert A. Gore, Jr.		Ralph Nader		Electoral votes		
	Popular vote	%	Popular vote	%	Popular vote	%	R	D	G
Alabama	941,173	56%	692,611	42%	18,323	1%	9		
Alaska	167,398	59	79,004	28	28,747	10	3		
Arizona	781,652	51	685,341	45	45,645	3	8		
Arkansas	472,940	51	422,768	46	13,421	1	6		
California	4,567,429	42	5,861,203	53	418,707	4		54	
Colorado	883,748	51	738,227	42	91,434	5	8		
Connecticut	561,094	38	816,015	56	64,452	4		8	
Delaware	137,288	42	180,068	55	8,307	3		3	
DC	18,073	9	171,923	85	10,576	5		2 ¹	
Florida	2,912,790	49	2,912,253	49	97,488	2	25		
Georgia	1,419,720	55	1,116,230	43	13,432 ²	1	13		
Hawaii	137,845	37	205,286	56	21,623	6		4	
Idaho	336,937	67	138,637	28	12,292 ²	2	4		
Illinois	2,019,421	43	2,589,026	55	103,759	2		22	
Indiana	1,245,836	57	901,980	41	18,531 ²	1	12		
Iowa	634,373	48	638,517	49	29,374	2		7	
Kansas	622,332	58	399,276	37	36,086	3	6		
Kentucky	872,492	57	638,898	41	23,192	2	8		
Louisiana	927,871	53	792,344	45	20,473	1	9		
Maine	286,616	44	319,951	49	37,127	6		4	
Maryland	813,797	40	1,145,782	56	53,768	3		10	
Massachusetts	878,502	33	1,616,487	60	173,564	6		12	
Michigan	1,953,139	46	2,170,418	51	84,165	2		18	
Minnesota	1,109,659	46	1,168,266	48	126,696	5		10	

Mississippi	572,844	58	404,614	41	8,122	1	7		
Missouri	1,189,924	50	1,111,138	47	38,515	2	11		
Montana	240,178	58	137,126	33	24,437	6	3		
Nebraska	433,862	62	231,780	33	24,540	4	5		
Nevada	301,575	50	279,978	46	15,008	2	4		
New Hampshire	273,559	48	266,348	47	22,198	4	4		
New Jersey	1,284,173	40	1,788,850	56	94,554	3		15	
New Mexico	286,417	48	286,783	48	21,251	4		5	
New York	2,403,374	35	4,107,697	60	244,030	4		33	
North Carolina	1,631,163	56	1,257,692	43	—	—	14		
North Dakota	174,852	61	95,284	33	9,486	3	3		
Ohio	2,351,209	50	2,186,190	46	117,857	3	21		
Oklahoma	744,337	60	474,276	38	—	—	8		
Oregon	713,577	47	720,342	47	77,357	5		7	
Pennsylvania	2,281,127	46	2,485,967	51	103,392	2		23	
Rhode Island	130,555	32	249,508	61	25,052	6		4	
South Carolina	785,937	57	565,561	41	20,200	1	8		
South Dakota	190,700	60	118,804	38	—	—	3		
Tennessee	1,061,949	51	981,720	47	19,781	1	11		
Texas	3,799,639	59	2,433,746	38	137,994	2	32		
Utah	515,096	67	203,053	26	35,850	5	5		
Vermont	119,775	41	149,022	51	20,374	7		3	
Virginia	1,437,490	52	1,217,290	44	59,398	2	13		
Washington	1,108,864	45	1,247,652	50	103,002	4		11	
West Virginia	336,475	52	295,497	46	10,680	2	5		
Wisconsin	1,237,279	48	1,242,987	48	94,070	4		11	
Wyoming	147,947	68	60,481	28	4,625 ²	2	3		
Total	50,456,002	47.87%	50,999,897	48.38%	2,882,955	2.74%	271	266	

NOTE: Total electoral votes = 538. Total electoral votes needed to win = 270. Dash (—) indicates not on ballot.

Percentages may not add up to 100% due to rounding and other candidates.

1. The District of Columbia has 3 votes. There was 1 abstention.

2. Write-in votes.

Source: Federal Election Commission.

Voting age population (Census Bureau Population Survey for Nov. 2000): 205,815,000

Percentage of voting age population casting a vote for president: 51.3%